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No. ___

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NANCY O'MARA EZOLD,

Petitioner,

—v.—

WOLF, BLOCK, SCHORR and SOLIS-COHEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JUDITH P. VLADECK
Counsel of Record

ANNE C. VLADECK
DEBRA L. RASKIN
MICHAEL B. RANIS
VLADECK, WALDMAN,
ELIAS & ENGELHARD, P.C.
1501 Broadway, Suite 800
New York, New York 10036
(212) 354-8330
Attorneys for
Nancy O'Mara Ezold

QUESTIONS PRESENTED

1. Whether, in determining whether an employer's justification for denial of partnership is a pretext for unlawful discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), trial courts are required to give special deference to subjective performance evaluations by law firms and other employers of professionals?

2. Whether the requirement of deference to subjective performance evaluations of professional employees allows an appeals court to usurp the factfinding function of the trial court in Title VII cases?

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NANCY O'MARA EZOLD,

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—v.—

WOLF, BLOCK, SCHORR and SOLIS-COHEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nancy O'Mara Ezold ("Ezold" or "petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals as amended (Appendix 1a-95a),[1] is reported at 983 F.2d 509 (3d Cir. 1992). The opinion of the District Court (Kelly, D.J.) on liability (App. 98a-132a), is reported at 751 F. Supp. 1175 (E.D. Pa. 1990) and two opinions of the District Court concerning damages (App. 133a-51a and App. 152a-60a) are reported at 758 F. Supp. 303 (E.D. Pa. 1991) and 56 Fair Employ. Prac. Cas. (BNA) 580 (E.D. Pa. 1991).

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[1] Pages in the Appendix are cited as "App. ____a."

JURISDICTION

The judgment of the Court of Appeals was entered on December 30, 1992 (App. 96a-97a), and a petition for rehearing with suggestion of rehearing in banc was denied on February 3, 1993. (App. 161a-62a). On April 2, 1993, Associate Justice Souter extended the time for filing this petition to June 18, 1993. (App. 207a). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 703(2)(a) of Title VII, 42 U.S.C. § 2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

A. The District Court's Findings

Petitioner Nancy O'Mara Ezold was denied partnership at respondent law firm Wolf, Block, Schorr and Solis-Cohen ("Wolf, Block") in 1988. Ezold commenced this action alleging that Wolf, Block, in violation of Title VII, had discrimi-

nated against her on the basis of her sex.[2] Jurisdiction was premised upon 28 U.S.C. § 1331 and 42 U.S.C. § 2000e-5(f).

During a thirteen day trial of Ezold's claim, the District Court heard seventeen witnesses and reviewed thousands of pages of exhibits. The District Court applied well-established equal employment law analysis, *Patterson v. McLean Credit Union*, 491 U.S. 164, 187-88 (1989); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973), and compared the evaluations of Ezold with the evaluations of the male associates who had been admitted to partnership in the year of her candidacy and in the preceding and following years.

Members of the firm's governing committees testified that there had never been "one single, solitary factor that turns a [partnership] decision," (App. 177a) and that partnership was determined on the basis of all twenty factors listed on the evaluation forms each partner completed annually for each associate. (App. 106a-107a, 176a). Ezold did not challenge the standards articulated by Wolf, Block. Focusing on the area of legal analysis which Wolf, Block emphasized as a reason for rejecting Ezold (App. 125a), the District Court found nothing in the extensive record that justified the firm's differential treatment of Ezold. The District Court found the application of that criterion to Ezold to have been biased because the firm promoted men having "evaluations substantially the same or inferior to the plaintiff's, and indeed promoted male associates who the defendant claimed had precisely the lack of analytical or writing ability upon which Wolf, Block purportedly based its decision concerning the plaintiff." (App. 130a).

In the contemporaneous memorandum summarizing the partners' evaluations of her in legal analysis in the year of the partnership determination (App. 108a-109a), Ezold was graded "good" in legal analysis, precisely the same grade that seven of the men promoted that year and in the preceding and following

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[2] Wolf, Block was then a firm with 107 partners, only five of whom were women. (App. 80a).

years received for legal analysis when they were considered for partnership. (App. 114a, 117a, 121a, 122a, 181a-83a, 184a-86a, 187a-89a, 190a-92a, 193a-95a, 196a-97a, 198a-202a).[3] The District Court found: "In the period up to and including 1988, Ms. Ezold received strongly positive evaluations from almost all of the partners for whom she had done any substantial work." (App. 110a). After evaluating the testimony of partners called as witnesses, the District Court concluded: "The mistakes of the plaintiff were not of greater magnitude or type than those of male associates who made partner." (App. 114a).

When Ezold was denied partnership in 1988, she was told that if she abandoned her areas of specialization, white collar criminal defense and commercial litigation and agreed to head the firm's domestic relations practice, she would be promoted the following year. The District Court found that "the additional year was not for purposes of giving any additional training or experience." (App. 125a). Accordingly, the trial court concluded that Wolf, Block "was satisfied that in 1988 [Ezold] had all the requisites to be a member of the Firm at that time." (*Id.*)

The District Court did not rely solely on the evaluations which reflected Ezold's comparability to the successful male associates. Rather, the record contained other direct evidence of Wolf, Block's discriminatory attitudes toward women. For example, as the District Court found, Seymour Kurland ("Kurland"), the chair of Wolf, Block's litigation department, told Ezold when she was hired as a litigation associate in 1983, that "it would not be easy for her at Wolf, Block because she did not fit the Wolf, Block mold since she was a woman," among other things. (App. 101a). Moreover, although he sometimes delegated the duty, Kurland was "responsible for assignment of work to associates in the Litigation Department" (App. 101a);

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[3] Wolf, Block's evaluation form defines the grade of "good" as characterizing an area in which the associate "[d]isplays particular merit on a consistent basis; effective work product and performance; able; talented." (App. 122a).

when Ezold complained to a senior litigation partner of discrimination in assignments, she was told: "[D]on't say that around here. They don't want to hear it." (App. 123a).

The District Court credited substantial evidence of the bias of the evaluators, and those findings were interwoven with the trial court's determination that the subjective standards were discriminatorily applied to plaintiff. The District Court's description of Wolf, Block's evaluation process showed it to be a ready receptacle for sex-bias: the process was wholly subjective and standardless,[4] resulted in decisions based on third or fourth hand information, and relied on evaluations infected with sex stereotyping. (App. 122a, 124a-25a).

The District Court determined that Wolf, Block had treated Ezold in a discriminatory manner prior to the promotion decision, including the presumption against her "because she was a woman," and the informal assignment process yielding inferior work opportunities for her. (App. 102a-106a). The District Court found that Wolf, Block was both critical of Ezold for raising, and unreceptive to resolving, issues regarding the firm's treatment of its women employees. (App. 103a, 123a-24a, 131a). Indeed, the District Court concluded that "the adverse partnership decision . . . represented a culmination of numerous elements of discriminatory treatment she had received throughout her years at the Firm." (App. 149a).

Against this background the District Court found pretextual Wolf, Block's partners' explanation for the rejection as a partner of a woman so many of them had evaluated favorably, par-

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[4] The District Court found that partners were asked to evaluate associates "on the basis of what *you* expect of an Associate at this Associate's level of experience," (App. 107a) (emphasis in original) and "regardless of the extent of the partner's familiarity with the associate's work." (App. 106a). While the Wolf, Block partners had on-going debates regarding the firm's "standards" for partnership (App. 114a-15a, 117a, 119a-20a), all twenty of the factors listed on the firm's evaluation forms were subjective, including such criteria as "growth potential," "attitude," and "dedication." (App. 106a-107a).

ticularly those who had worked most closely with her. The trial court entered judgment for Ezold.

B. The Court of Appeals' Decision

The Court of Appeals reversed. The appellate court found that the principal flaw in the finding of discrimination was the District Court's failure to give special deference to the subjective judgments made by Wolf, Block in its evaluation of Ezold. In an analysis that the Court of Appeals described as "inform[ed]" by "cautions" against " 'unwarranted invasion or intrusion' into matters involving professional judgments about an employee's qualifications for promotion within a profession" (App. 42a), the Court of Appeals created a new standard that largely insulates employers of professionals who use subjective evaluations from traditional factfinding applicable to other employers under the equal opportunity laws.

> *Were the factors* Wolf considered in deciding which associates should be admitted to the partnership *objective, as opposed to subjective*, the conflicts in various partners' views about Ezold's legal analytic ability that this record shows might amount to *no more than a conflict in the evidence that the district court as factfinder had full power to resolve*.

(App. 47a) (emphasis supplied). So saying, the Court of Appeals discarded, without reference, a long line of authority recognizing the ease with which employers can manipulate subjective standards to mask discrimination and the concomitant need to scrutinize the application of such standards more closely. The Court of Appeals then created a new standard, one far more difficult, if not impossible, for victims of discrimination to meet: special deference to the decisionmakers in professional employment.

Having announced the new standard, the appellate court launched into a 93-page *de novo* review of the record, rejecting even those of the District Court's findings which were

based on the firm's admissions, and, without benefit of having heard the witnesses, accepting testimony contrary to the trial court's explicit findings.[5] Although the evaluation of such evidence is a task this Court reserves for the factfinder, *Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982), the Court of Appeals relied on discredited evaluations of Ezold by partners whose actions or comments were found by the District Court to evince sex-bias. (Partner Kurland (App. 18a, 101a, 103a); partner Schwartz (App. 14a-15a, 16a-17a, 19a-20a, 123a-24a, 131a); partner Arbittier (App. 14a, 15a, 21a, 102a-103a)).[6]

The Court of Appeals also established a new rule requiring that evaluations of partnership candidates be examined in a vacuum. The appellate court held that, *to be given any weight*, the non-comparative evidence had to be sufficient *standing alone* to prove pretext without regard to the evaluations. (App. 72a-74a). The Court of Appeals thus segregated from its consideration of Ezold's and the male associates' evaluations, evidence of discrimination by various partners and of Wolf, Block's negative reaction to Ezold's complaints concerning bias. *See McDonnell Douglas*, 411 U.S. at 804 ("Other evidence that may be relevant to any showing of pretext includes facts as to . . . [the employer's] reaction . . . to [the employee's] legitimate civil rights activities.")

The Court of Appeals held relevant only that evidence which concerned "the qualification the employer [allegedly] found lacking in determining whether non-members of the protected

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[5] For example, the Court of Appeals discounted partner Magarity's high ratings of Ezold's analytic ability and credited Wolf, Block's description of him as an "easy grader" (App. 58a n.26), even though the District Court expressly relied upon Magarity's admissions concerning Ezold's skills. (App. 103a-104a, 106a). The Court of Appeals did not find Magarity too "easy" a marker of male candidates. (App. 58a).

[6] *Cf. Icicle Sea Foods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) (The court of appeals "should not simply have made factual findings on its own," but should have remanded to the district court for findings under the legal standard the appellate court articulated.)

class were treated more favorably" (App. 43a-44a), even though Wolf, Block had admitted that no one factor ever was dispositive, and the District Court had, indeed, focused its attention on the qualification the firm had described as its primary criterion, legal analysis. The Court of Appeals thus relegated to irrelevancy unrebutted evidence of the successful male candidates' failings, like disappearing for days without warning or alienating major clients, shortcomings in areas that Wolf, Block conceded were also important to partnership admission and which the District Court had weighed in finding pretext. *Cf. Patterson*, 491 U.S. at 187 ("to demonstrate that respondent's proffered reasons for its decision were not its true reasons . . . petitioner is not limited to presenting evidence of a certain type").

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION

Review of this case is vitally important to the enforcement of the nation's anti-discrimination laws. As the Court of Appeals stated, its decision, the first appellate review of a trial court finding of discrimination in law firm partnership admission, presents "important issues that cut across the spectrum of discrimination law." (App. 4a). Among those issues are the questions of whether the trial court must pay special deference to employers' application of subjective standards in evaluating professional employees. Also raised by the decision is the question of whether the trial court must surgically separate particular types of evidence in such cases, even though proof of pretext is typically considered in the totality of the workplace environment. The Court of Appeals responded to those questions by requiring virtually unreviewable deference to the decisionmakers in such cases, and by creating new evidentiary rules for professional employment decisions challenged as discriminatory.

The new standards articulated by the Court of Appeals permitted it to comb the extensive record to locate pieces of proof purportedly supporting the law firm's determination, and to reverse a judgment based upon the District Court's one hundred and fifty-one detailed factual findings reached after thirteen trial days, consideration of the testimony and demeanor of seventeen witnesses, and a review of thousands of pages of exhibits.

The tests devised by the Court of Appeals effectively guarantee that the employer will prevail in any discrimination case involving professional employees. Although the appellate court states that direct proof of bias is not required (App. 32a), the wide latitude given to employers to apply subjective standards, with only deferential review by the courts (and with even that review fitted into new evidentiary constraints), makes it almost impossible to envision a discrimination case in which a plaintiff employed in an upper level job could win without "smoking gun" proof.

It has long been recognized that it would be impossible to enforce the equal opportunity laws if employers could avoid liability by citing sufficiently amorphous criteria and pointing to differences of opinion concerning the plaintiff's performance under those standards. Accordingly, courts have held that because subjective criteria can be easily used to mask discrimination, application of such criteria is subject to more careful scrutiny by the fact finder. *See, e.g., Lindsey v. Prive Corp.*, 61 Fair Empl. Prac. Cas. (BNA) 770, 772 (5th Cir. 1993) ("We have recognized the potential of subjective criteria to provide cover for unlawful discrimination.") The Court of Appeals' decision here turns discrimination law on its head; instead of examining with *greater scrutiny* the application of subjective criteria, the decision requires the factfinder to accord *greater deference* to the employer who says it relies only on such criteria.

The Court of Appeals thus has set aside long standing equal employment law, creating a standard that collides with this Court's holdings in *Hishon v. King & Spalding*, 467 U.S. 69 (1984) and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), that those laws guarantee the right to non-biased consideration for upper echelon jobs. The profound consequences of the Court of Appeals' new standard for discrimination litigation involving upper level job opportunities warrant this Court's review.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH PRECEDENTS OF THIS COURT AND WITH DECISIONS OF OTHER COURTS OF APPEALS.

A. This Court's Title VII Decisions Do Not Use a Different Analysis for the Evaluation of Subjective Criteria.

This Court has recognized the difficulty inherent in "distinguish[ing] 'subjective' from 'objective' criteria," and how differential standards based on that purported dichotomy can "allow[ ] employers so easily to insulate themselves from liability. . . ." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 989-90 (1988). As a consequence, the Court has "consistently used conventional disparate treatment theory . . . to review hiring and promotion decisions that were based on the exercise of personal judgment or the application of inherently subjective criteria." *Id.* at 988.

Yet, the Court of Appeals created a standard of substantial deference to an employer's subjective decisionmaking which contravenes this Court's conclusion that the equal opportunity laws accord no special treatment to employment decisions based on non-objective reasons. Because the criteria at issue were "subjective" as opposed to "objective" (App. 47a), the Court of Appeals concluded that the District Court's authority to resolve the issues of fact presented by the evaluations of the plaintiff was restricted by the newly announced rule of special deference.

Under the reasoning of the Court of Appeals, unless *all* evaluations ranked the female candidate higher than the successful males, the District Court could conclude only that the employer "may have been wrong in its perception" of the female candidate's skills (App. 57a), but would be stripped of the ability to infer discrimination specifically accorded to the factfinder by this Court. "[T]hat a court may think that the employer misjudged the qualifications of the applicants does not *in itself* expose him to Title VII liability, *although this may be probative of whether the employer's reasons are pretexts for discrimination.*" *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (emphasis supplied).[7]

Despite evidence that Wolf, Block deliberately rejected Ezold, who had the same summary "grade" in legal analysis as the successful men and better grades on other listed criteria and that the firm offered her a delayed promotion to partner in the domestic relations area without further training, the Court of Appeals suggested that Wolf, Block's decision about Ezold may have been, at worst, a "mistake." (App. 57a). On this basis, the Court of Appeals reversed the finding of discrimination, and required deference to the dissenting evaluations of partners whose testimony the District Court had rejected as tainted by bias.

The new requirement of deference is not the only way in which the Court of Appeals restricted proof of discrimination in cases involving lawyers and other professional employees. The Court of Appeals placed inflexible and unprecedented limitations on the ability of lawyer plaintiffs and other professionals to establish pretext. As this Court has directed, the method of proving discrimination "was 'never intended to be rigid, mechanized, or ritualistic.' " *United States Postal Service*

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[7] *See O'Connor v. Peru State College*, 781 F.2d 632, 637 (8th Cir. 1986) ("An employer's misjudgment of an employee's qualifications and misconceptions as to the facts surrounding her job performance may be probative of whether the reasons articulated for an employment decision are merely pretexts for discrimination.")

Board of Governors v. Aikens, 460 U.S. 711, 715 (1983) (quoting *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978)). The Court of Appeals nevertheless required that all evidence of bias on the part of the evaluators of such professionals be considered separately from the evidence of the comparisons between the ratings of the plaintiffs in such cases and those of the successful male or non-minority candidates. (App. 72a-74a).

Effectively creating a new rule for district courts examining allegations of pretext, the Court of Appeals strictly limited consideration of evidence showing the environment in which the challenged decision was made. The trial court had found direct evidence of biased comments and practices; the Court of Appeals rejected such proof. (App. 74a-80a, 82a-93a). Instead, the appellate court, in contravention of this Court's repeated emphasis that the factfinder must have wide latitude in determining pretext, *see Patterson*, 491 U.S. at 187-88; *McDonnell Douglas*, 411 U.S. at 804-805; *Furnco Construction Corp.*, 438 U.S. at 577; *Aikens*, 460 U.S. at 714 n.3., held that the evidence of the discriminatory context in which the challenged decision was made must, standing alone, be sufficient to establish discrimination. (App. 72a-74a, 93a).

In addition, the Court of Appeals held that: "A plaintiff does not establish pretext . . . by pointing to criticisms of members of the non-protected class, or commendation of the plaintiff, in categories the defendant says it did not rely upon in denying promotion to a member of the protected class." (App. 51a).[8]

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[8] The Court of Appeals cites no case in which such a rule has been adopted. The authority on which the Court of Appeals relies (App. 44a, 52a) holds that general positive reviews do not establish pretext where an employer has relied upon a "specific, substantial and undisputed" performance deficiency. *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 344 (3d Cir. 1990); *see, e.g., Frieze v. Boatmen's Bank of Belton*, 950 F.2d 538, 540 (8th Cir. 1991) (admittedly "unprofessional" act of insubordination). Here, of course, the purported deficiency was not only disputed, but Ezold's summary grade in that area was the same as those of the males promoted.

The trial court, however, had before it Wolf, Block's contentions that no one factor was ever dispositive in a partnership determination and that there were twenty relevant criteria. Nevertheless, the appellate court held irrelevant as a matter of law extensive findings that Ezold scored significantly higher on the other criteria the firm claimed were important, and that the firm had promoted males with grievous inadequacies in those areas that it had acknowledged to be essential while Ezold had none of those deficiencies.[9]

Even if Wolf, Block had not acknowledged that other qualifications were relevant to its decisionmaking, the Court of Appeals' new rule limiting the factors to be considered by district courts in cases involving professional employees, is contrary to this Court's repeated warnings against rigidity in evaluating proof of discrimination. *See Aikens*, 460 U.S. at 715; *Anderson v. Bessemer City*, 470 U.S. 564, 576-77 (1985).[10] Other Courts of Appeals have affirmed trial court rulings finding pretext based, at least in part, on comparative qualifications in areas other than those allegedly relied upon by the defendant employers. *Bruhwiler v. University of Tennessee*, 859 F.2d 419, 420 (6th Cir. 1988); *Easley v. Empire, Inc.*, 757 F.2d 923, 930-31 (8th Cir. 1985). The Court of Appeals' contrary rule dictates that where, for example, tardiness is alleged as the basis for not promoting a woman professional, the district court, as a mat-

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[9] Such evidence included Wolf, Block's promotion of men the partners said were " '[n]ot real smart,' " who disappeared unannounced for days at a time or who put the firm at risk of losing a million dollars in billings. (App. 116a-17a).

[10] This Court in *Anderson* found that the district court did not err when it inferred pretext from job candidates' qualifications in areas in addition to those allegedly relied upon by the employer. 470 U.S. at 576-77. The plaintiff in *Anderson* undisputedly lacked the degree that the defendant asserted as the reason for hiring a male applicant. This Court, however, held that the Fourth Circuit improperly had reversed the trial court's "determin[ation] that petitioner's more varied educational and employment background . . . left her better qualified to implement such a rounded [recreational] program than" the successful male candidate. *Id.* at 576.

ter of law, could not consider as proof of pretext evidence that male employees who habitually picked fights with co-workers or who had committed malpractice were promoted. This Court's holdings do not require blind deference to any employer's decisionmakers, nor do they permit such constriction of the trial court's ability to find pretext in professional employment.

Finally, the Court of Appeals applied a standard that comes perilously close to the "clear and convincing evidence" standard this Court rejected for Title VII cases in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 253 (1989).[11] The appellate court stated that: "In a comparison of subjective factors such as legal ability, it must be *obvious or manifest* that the subjective standard was unequally applied before a court can find pretext." (App. 60a) (emphasis supplied). Even assuming that "obvious or manifest" proof was necessary and that this requirement was not contrary to *Hopkins*, the evidence of bias here *was* obvious and manifest—different treatment despite identical summary grades, Kurland's explicit comments, and other stark evidence of discrimination. If Ezold's proof is insufficient, no female or minority professional employee could ever pierce the protective wall the Court of Appeals has erected around law firms and other employers of professionals.

B. The Court of Appeals' Rule Conflicts With Other Courts of Appeals' Requirement that The Factfinder Review Subjective Decisionmaking With Special Caution.

In contrast to the deferential standard and the limitations on the ability to show pretext established by the Court of Appeals, a line of authority dating back more than twenty years, *see, e.g., Rowe v. General Motors Corp.*, 457 F. 2d 348, 359 (5th Cir. 1972), and adopted by many Courts of Appeals, analyzes

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[11] "Conventional rules of civil litigation generally apply in Title VII cases . . . and one of these rules is that parties . . . need only prove their case by a preponderance of the evidence." 490 U.S. at 253.

subjective decisionmaking in a fashion consistent with Title VII. Thus in *Royal v. Missouri Highway and Transportation Commission*, 655 F.2d 159, 164 (1981) (emphasis supplied), the Eighth Circuit held: "When the evaluation is in any degree subjective and when the evaluators themselves are not members of the protected minority, the legitimacy and nondiscriminatory basis of the articulated reason for the decision should be *subject to particularly close scrutiny by the trial judge.*"[12]

The cases adopting this reasoning are legion. *Lilly v. Harris Teeter Supermarket*, 842 F.2d 1496, 1506 (4th Cir. 1988) ("The evidence further revealed well-settled indicia of an employment environment where race discrimination could flourish[; the employer] considered only subjective criteria. . . ."); *Grano v. Department of Development of Columbus*, 699 F.2d 836, 837 (6th Cir. 1983) ("Courts have frequently noted that subjective evaluation processes intended to recognize merit provide ready mechanisms for discrimination. [Citations omitted]. Moreover, the legitimacy of the articulated reason for the employment decision is subject to particularly close scrutiny where the evaluation is subjective and the evaluators themselves are not members of the protected minority."); *Mohammed v. Callaway*, 698 F.2d 395, 399 (10th Cir. 1983) ("Evidence relevant to such a showing [of pretext] includes . . . the use of subjective criteria. . . ."); *Davis v. Califano*, 613 F.2d 957, 965 (D.C. Cir. 1979) ("No objective criteria were established to guide the promotion decisions of supervisors, branch chiefs and ad hoc promotion panels, who were predominantly male. . . . Appellee's promotion procedures are

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[12] Only five of more than one hundred partners completing annual associate evaluations were female. (App. 80a). Only one woman sat on the ten member Associates Committee and no woman was a member of the five man Executive Committee that had the final say on Ezold's partnership admission. (App. 178a-79a). Contrary to another erroneous "fact" found by the Court of Appeals (App. 49a), the partnership as a whole did not vote on Ezold's candidacy; her candidacy was rejected by the Executive Committee and therefore was never submitted for a vote of the full partnership. (App. 110a).

highly suspect and must be closely scrutinized because of their capacity for masking unlawful bias.")

This case strikingly illustrates the dangers recognized by other circuits: that employers can flexibly define subjective standards to effect discriminatory results and that "clever men may easily conceal their motivations." *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975) (*quoted in Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 465 (2d Cir. 1989)). One of the many definitions Wolf, Block's partner/witnesses gave to "legal analysis" sufficient for entry level partnership was the ability to handle on one's own "*any* case that the firm gets, no matter how complex. . . ." (App. 177a) (emphasis supplied). Because the firm conceded that no *junior partner* was ever assigned such responsibility, the District Court found that applying this standard to Ezold for admission as a junior partner, was evidence of pretext. (App. 122a-23a). By articulating qualifications not required by the firm, Wolf, Block acted in a manner supporting an inference of discrimination. *Tuck v. Henkel Corp.*, 973 F.2d 371, 376 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 1276 (1993).

C. The Decision Radically Expands The Scope Of Appellate Court Review In Discrimination Cases Involving Subjective Employment Decisions.

The Court of Appeals changed not only the rules that factfinders are to apply in evaluating subjective employment determinations challenged as discriminatory; the decision also established a new standard for appellate consideration of a trial court's findings in such cases. While citing Fed. R. Civ. P. 52 (App. 37a-38a), the decision created an impermissible distinction between findings concerning "objective" performance measures and those concerning "subjective" measures. In discrimination cases, where the central issues are intent and credibility, deference to the trial court's findings of fact must be

dispositive.[13] An employer's use of subjective criteria does not justify deference to the employer's decisionmakers or permit a reviewing court to consider the record *de novo*.

The Court of Appeals here permitted itself to sift through the record *de novo* as if Rule 52 did not apply, because the performance standards in issue were subjective. It credited certain evaluations and rejected the credibility of others, a function reserved for the trial court. As this Court has held: "The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court . . . . '[Its] function is not to decide factual issues *de novo*.' " *Anderson*, 470 U.S. at 573 (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969)); *see Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 856 (1982).

Such appellate factfinding is particularly ill-suited to the evaluation of claims of discrimination, which are quintessentially fact specific. Sidestepping the deference that must be accorded to credibility determinations, the Court of Appeals stated: "the district court never made a finding that the critical evaluations were themselves incredible or a pretext for discrimination." (App. 53a). The District Court's findings and conclusions, however, were that the firm's partners *were not credible*. (App. 101a, 114a-15a, 122a-25a, 130a-31a).

The District Court rejected Wolf, Block's proposed findings concerning its partners' testimony as to whether Ezold actually

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[13] This Court in *Aikens* recognized the centrality of factual determinations to employment discrimination cases:

> All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. . . . There will seldom be "eyewitness" testimony as to the employer's mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact.

460 U.S. at 716.

had committed the "analytic" errors with which she was charged. (App. 164a-75a). Weighing the conflicting evidence, and rejecting the law firm's version, *is* a credibility determination. In instances where there were two versions of what happened, the District Court adopted findings proposed by Ezold, each of which was supported by record citations to documents, testimony, or admissions (App. 101a, 114a, 115a-24a), and rejected the counter-proposals made by Wolf, Block on the same issue. As this Court has held:

> Where there are two permissible views of the evidence the factfinder's choice between them cannot be clearly erroneous. . . . [W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.

Anderson, 470 U.S. at 574-75.

The District Court's findings were based on credibility; the trial court was not obliged to label them as such. *Bechold v. IGW Systems, Inc.*, 817 F.2d 1282, 1285 n.2 (7th Cir. 1987) ("Where it is clear that the district court made a credibility determination in arriving at its findings of fact, we have treated such findings as tantamount to credibility determinations. We will not require a specific incantation when the basis of a finding is otherwise clear.")[14] Review by this Court therefore is necessary to prevent the wholesale repeal of Rule 52 for cases involving subjective employment decisions affecting lawyers and other professional employees.

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[14] In fact, Wolf, Block complained to the Court of Appeals (App. 205a n.29) that the trial court adopted Ezold's proposed findings on critical issues as to which Wolf, Block also had submitted proposed findings, and thereby admitted that the District Court had rejected the credibility of the firm's witnesses.

III. THE DECISION BELOW PRESENTS ISSUES OF CRITICAL IMPORTANCE BECAUSE IT SEVERELY LIMITS TITLE VII PROTECTION IN HIGHER LEVEL POSITIONS FOR WOMEN AND OTHER UNDERREPRESENTED GROUPS.

The new rules that the Court of Appeals announced threaten to read out of the law the Court's holdings in *Hishon v. King & Spalding*, 467 U.S. 69 (1984) and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), that Title VII's guarantee of equal opportunity is fully applicable to employment decisions involving admission to professional partnership. If a finder of fact cannot infer discrimination where, as here, the employer's admissions and other evidence of bias require the conclusion that subjective tests were differentially applied, the equal employment laws will be a dead letter for any jobs where performance is not measured solely by quantitative standards. *See Sweeney v. Board of Trustees of Keene State College*, 569 F.2d 169, 176 (1st Cir.), *vacated on other grounds*, 439 U.S. 24 (1978), *aff'd*, 604 F. 2d 106 (1st Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980).

Indeed, the Panel's decision is wholly contrary to Congress's public policy pronouncement in the Glass Ceiling Act of 1991, Pub. L. No. 102-166, tit. II, 105 Stat. 1081, note following 42 U.S.C.A. § 2000e (West Supp. 1993), which was designed to encourage the removal of artificial barriers to the advancement of women and minorities in the professions. In enacting that statute, Congress found that "despite a dramatically growing presence in the workplace, women and minorities remain underrepresented in management and decisionmaking positions in business." Glass Ceiling Act § 202(a)(1). Because admission to virtually all such positions is determined by subjective criteria, resolution of the question presented here will be central to employment issues Congress has recognized as critical.

When Congress wished to exempt higher level positions from the equal opportunity statutes, it did so specifically. *See*

former Section 702 of Title VII, Pub. L. No. 88-352, 78 Stat. 255 (1964) (exemption for individuals engaged in educational activities which was repealed in 1972 by Pub. L. No. 92-261, 86 Stat. 103 (1972)) (codified as amended at 42 U.S.C. § 2000e-1); the Age Discrimination in Employment Act § 12, 29 U.S.C. § 631(c)(1) (mandatory retirement at age 65 not prohibited for an individual in a "bona fide executive or a high policymaking position").

By depriving the District Court of its factfinding powers, the Court of Appeals, in effect, has enacted an exemption to the equal employment laws for lawyers and other professionals. Under the new standards of deference, it would be a rare employer indeed who could not disguise biased motives by claiming deficiencies in characteristics measured by subjective standards. Such judicial activism is contrary to statute and to this Court's holdings in *Hishon* and *Hopkins*,[15] and cannot stand.

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[15] *See University of Pennsylvania v. EEOC*, 493 U.S. 182, 190 (1990) (1972 amendments making Title VII applicable to universities "expose[d] tenure determinations to the same enforcement procedures applicable to other employment decisions.")

CONCLUSION

Consideration of the case by this Court is warranted by the importance of the issues raised concerning the application of the equal opportunity statutes to lawyers and other professional employees and by the conflict between other courts of appeals' decisions and the decision below. For the foregoing reasons, this Court should grant the petition and issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Dated: New York, New York
June 17, 1993

Respectfully submitted,

VLADECK, WALDMAN, ELIAS &
ENGLEHARD, P.C.

/s/ JUDITH P. VLADECK

Judith P. Vladeck
Counsel of Record

Anne C. Vladeck
Debra L. Raskin
Michael B. Ranis
1501 Broadway, Suite 800
New York, New York 10036
(212) 354-8330
Attorneys for
Nancy O'Mara Ezold

APPENDIX

Filed December 30, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 91-1741 & 91-1780

NANCY O'MARA EZOLD,
Appellant at No. 91-1780

v.

WOLF, BLOCK, SCHORR AND SOLIS-COHEN,
Appellant at No. 91-1741

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Docket No. 90-00002)

Argued: May 21, 1992

PRESENT: HUTCHINSON, COWEN and SEITZ,
Circuit Judges

(Opinion Filed: December 30, 1992)

Judith P. Vladeck, Esquire (Argued)
Vladeck, Waldman, Elias & Engelhard, P.C.
Suite 800
1501 Broadway
New York, NY 10036
Attorney for Nancy O'Mara Ezold

Arlin M. Adams, Esquire (Argued)
Schnader, Harrison, Segal & Lewis

Suite 3600
1600 Market Street
Philadelphia, PA 19103

and

Mark S. Dichter, Esquire
Morgan, Lewis & Bockius
2000 One Logan Square
Philadelphia, PA 19103
Attorneys for Wolf, Block, Schorr and Solis-Cohen

Linda J. Wharton, Esquire
Carol E. Tracy, Esquire
Judith L. Riddle, Esquire
Women's Law Project
Suite 401
125 South Ninth Street
Philadelphia, PA 19107
and

Pamela L. Perry, Esquire
Rutgers School of Law
Fifth and Penn Streets
Camden, NJ 08102
Attorneys for Amici Curiae Women's Law Project; National Bar Association, Women Lawyers Division, Philadelphia Chapter; National Association of Black Women Attorneys; Hispanic Bar Association of Pennsylvania; New Jersey Women Lawyers Association; San Francisco Women Lawyers' Alliance; Pennsylvania National Organization for Women; Women's Alliance for Job Equity; American Association of University Women, Pennsylvania Division; American Association of University Women;

AAUW Legal Advocacy Fund; Business and Professional Women/USA; Center for Women Policy Studies; National Association of Commissions for Women; National Association of Female Executives; National Organization for Women; National Women's Law Center; NOW Legal Defense and Education Fund; Women Employed; Women's Legal Defense Fund; Employment Law Center; California Women's Law Center; Equal Rights Advocates, Inc.; Northeast Women's Law Center; and Women and Employment, Inc.

OPINION OF THE COURT

HUTCHINSON, *Circuit Judge*.

Wolf, Block, Schorr and Solis-Cohen (Wolf) appeals from a judgment of the United States District Court for the Eastern District of Pennsylvania granting relief in favor of Nancy O'Mara Ezold (Ezold) on her claim that Wolf intentionally discriminated against her on the basis of her sex in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.A. §§ 2000e to 2000e-17 (West 1981 & Supp. 1992), when it decided not to admit her to the firm's partnership effective February 1, 1989. At trial Wolf contended that it denied Ezold admission to the partnership because her skills in the category of legal analysis did not meet the firm's standards. The district court disagreed and found that this articulated reason was a pretext contrived to mask sex discrimination. Wolf argues on appeal that the

district court improperly analyzed the evidence before it and that the evidence, properly analyzed, does not support the district court's ultimate finding of pretext.

This case raises important issues that cut across the spectrum of discrimination law. It is also the first in which allegations of discrimination arising from a law firm partnership admission decision require appellate review after trial.[1] Accordingly, we have given it our closest attention and, after an exhaustive examination of the record and analysis of the applicable law, have concluded that the district court made two related errors whose combined effect require us to reverse the judgment in favor of Ezold. The district court first impermissibly substituted its own subjective judgment for that of Wolf in determining that Ezold met the firm's partnership standards. Then, with its view improperly influenced by its own judgment of what Wolf should have done, it failed to see that the evidence could not support a finding that Wolf's decision to deny Ezold admission to the partnership was based upon a sexually discriminatory motive rather than the firm's assessment of her legal qualifications. Accordingly, we hold not only that the district court analyzed the evidence improperly and that its resulting finding of pretext is clearly erroneous, but also that the evidence, properly analyzed, is insufficient to support that finding and therefore its ultimate

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1. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), involved an accounting firm's denial of partnership to a female accountant. That case did proceed to trial but the appellate decisions provide guidance only on the parties' burdens of proof in a mixed motives case. This case was not tried on that theory.

conclusion of discrimination cannot stand. We will therefore reverse and remand for entry of judgment in favor of Wolf. This disposition makes it unnecessary to address the issues raised in Wolf's appeal concerning the remedy the district court awarded to Ezold or those in Ezold's cross-appeal concerning her claim of constructive discharge.

I.

Ezold sued Wolf under Title VII alleging that Wolf intentionally discriminated against her because of her sex when it decided not to admit her to the firm's partnership. She further alleged that she was constructively discharged by reason of the adverse partnership decision. The court bifurcated the issues of liability and damages. After a lengthy bench trial the district court rendered its Findings of Fact and Conclusions of Law on November 29, 1990. *See Ezold v. Wolf, Block, Schorr and Solis- Cohen*, 751 F. Supp. 1175 (E.D. Pa. 1990) (*Ezold I*). It entered judgment in favor of Ezold on her claim for intentional discrimination and against her on her claim for constructive discharge.

The district court held that the nondiscriminatory reason articulated by Wolf for its rejection of Ezold's candidacy—that her legal analytical ability failed to meet the firm's partnership standard—was a pretext. It stated:

> Ms. Ezold has established that the defendant's purported reasons for its conduct are pretextual. The defendant promoted to partnership men having evaluations substantially the same or inferior to the plaintiff's, and indeed promoted male associates who the defendant claimed had

> precisely the lack of analytical or writing ability upon which Wolf, Block purportedly based its decision concerning the plaintiff. . . . Such differential treatment establishes that the defendant's reasons were a pretext for discrimination.

Id. at 1191-92 (Conclusion of Law (COL) 11). The district court also held that four instances of conduct by Wolf supported its finding of pretext: (1) Ezold was evaluated negatively for being too involved with women's issues in the firm; (2) a male associate's sexual harassment of female employees at the firm was seen as "insignificant" and not mentioned to the Associates Committee prior to the partnership decision; (3) Ezold was evaluated negatively for being very demanding, while male associates were evaluated negatively for lacking assertiveness; and (4) Ezold "was the target of several comments demonstrating [Wolf's] differential treatment of her because she is a woman." *Id.* at 1192 (COL 12).

In holding that Ezold had failed to establish that she was constructively discharged, the district court stated:

> A reasonable person in Ms. Ezold's position would not have deemed her working conditions to be so intolerable as to feel compelled to resign.

Id. (COL 16). This holding became relevant to the issue of damages. By way of relief, Ezold sought backpay as well as instatement in the firm as a partner, and if such instatement was impractical, front pay. Wolf argued to the district court that its holding that Ezold was not constructively discharged limited her relief to back pay covering

the period from her unlawful denial of admission to the partnership, effective February 1, 1989, until the date of her voluntary resignation from the firm on June 7, 1989. On March 15, 1991, the district court decided that its holding against Ezold on her constructive discharge claim did not preclude her from obtaining relief for the period following her voluntary resignation. *See Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 758 F. Supp. 303 (E.D. Pa. 1991) (*Ezold II*).

The parties then briefed the issue of whether Ezold properly mitigated her damages as required by section 706(g)(1) of Title VII, 42 U.S.C.A. § 2000e-5(g)(1). On July 23, 1991, the district court issued its final memorandum and order. It ruled that Ezold had properly mitigated her damages and that her rejection of Wolf's offer to admit her as a partner as of February 1, 1990 if she accepted responsibility for its domestic relations practice did not toll Wolf's liability for back pay. The court then awarded Ezold back pay in the amount of $131,784.00 for the period from her resignation on June 7, 1989 to January 31, 1991. The parties agreed that if the court's November 27, 1990 and March 15, 1991 orders were affirmed on appeal, Ezold would be instated as a partner.[2] The court incorporated this agreement into its orders. The district court also awarded Ezold attorney's fees and costs. Wolf timely appealed from the district court's orders. Ezold filed a protective cross-appeal from the

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2. The district court's order also stated that if its prior orders were affirmed on appeal, it would thereafter determine back pay for the period from February 1, 1991 to the date of Ezold's instatement as a partner.

district court's denial of her constructive discharge claim.

II.

Ezold was hired by Wolf as an associate on a partnership track in July 1983. She had graduated in the top third of her class from the Villanova University School of Law in 1980 and then worked at two small law firms in Philadelphia. Before entering law school, Ezold had accumulated thirteen years of administrative and legislative experience, first as an assistant to Senator Edmund Muskie, then as contract administrator for the Model Cities Program in Philadelphia, and finally as Administrator of the Office of a Special Prosecutor of the Pennsylvania Department of Justice.

Ezold was hired at Wolf by Seymour Kurland, then chairman of the litigation department. The district court found that Kurland told Ezold during an interview that it would not be easy for her at Wolf because "she was a woman, had not attended an Ivy League law school, and had not been on law review." *Ezold I*, 751 F. Supp. at 1177 (Finding of Fact (FOF) 18). Subsequent to this meeting, but prior to accepting Wolf's offer of employment, Ezold had lunch with Roberta Liebenberg and Barry Schwartz, both members of the litigation department. She did not ask them anything about the firm's treatment of women.

Ezold was assigned to the firm's litigation department. From 1983-87, Kurland was responsible for the assignment of work to associates in the department. He often delegated this responsibility to partner Steven Arbittier. As Ezold acknowledged, many partners bypassed the

formal assignment procedure and directly assigned matters to associates. The district court found that Arbittier assigned Ezold to actions that were "small" by Wolf standards. *Id.* at 1178 (FOF 24).

Ezold's performance was reviewed regularly throughout her tenure pursuant to Wolf's evaluation process, which operates as follows: The Associates Committee, consisting of ten partners representing each of the firm's departments, first reviews the performance of all the firm's associates and makes recommendations to the firm's five-member Executive Committee as to which associates should be admitted to the partnership. The Executive Committee then reviews the partnership recommendations of the Associates Committee and makes its own recommendations to the full partnership. The firm's voting partners consider only those persons whom the Executive Committee recommends for admission to the partnership.

Senior associates within two years of partnership consideration are evaluated annually; non-senior associates are evaluated semi-annually. The firm's partners are asked to submit written evaluations on standardized forms.[3] The partner is asked the degree of contact he has had with the associate during the evaluation period. Partners were instructed that the evaluations were to be completed regardless of the extent of the evaluating partner's contact or familiarity with the associate's work. Ten criteria of legal performance

3. There was little change beyond format in the evaluation forms used throughout Ezold's tenure. We will describe the evaluation forms in effect in 1987 and 1988, the years Ezold was a senior associate being evaluated for admission to the partnership.

are listed on the forms in the following order: legal analysis, legal writing and drafting, research skills, formal speech, informal speech, judgment, creativity, negotiating and advocacy, promptness and efficiency. Ten personal characteristics are also listed: reliability, taking and managing responsibility, flexibility, growth potential, attitude, client relationship, client servicing and development, ability under pressure, ability to work independently, and dedication. As stated by Ian Strogatz,[4] Chairman of the Associates Committee: "The normal standards for partnership include as factors for consideration all of the ones . . . that are contained [on] our evaluation forms." Joint Appendix (App.) at 1170.

Despite format changes, legal analysis was always listed as the first criterion to be evaluated. This criterion was defined on the evaluation forms used in 1987 and 1988 as the "ability to analyze legal issues; grasp problems; collect, organize and understand complex factual issues." *Id.* at 3728. Partners provide grades as well as written comments on these criteria. The evaluation forms describe the grades as follows:

> -**DISTINGUISHED**: Outstanding, exceptional; consistently demonstrates extraordinary adeptness and quality; star.
>
> -**GOOD**: Displays particular merit on a consistent basis; effective work product and performance; able; talented.

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4. At all relevant times, Strogatz served as chairman of the Associates Committee.

-**ACCEPTABLE**: Satisfactory; adequate; displays neither particular merit nor any serious defects or omissions; dependable.

-**MARGINAL**: Inconsistent work product and performance; *sometimes* below the level of what you expect from Associates who are acceptable at this level.

-**UNACCEPTABLE**: Fails to meet minimum standard of quality expected by you of an associate at this level; *frequently* below level of what you expect.

Id. at 3464 (emphasis in original).

The form asks the evaluating partner to describe any particular strengths or weaknesses of an associate. Partners are also asked to indicate their views on the admission of each senior associate to the partnership. The evaluation lists five possible responses: "with enthusiasm," "with favor," "with mixed emotions," "with negative feelings" or "no opinion." Partners are also asked to respond "yes" or "no" to the following question: "I would feel comfortable turning over to this Associate to handle on his/her own a significant matter for one of my clients." *Id.* at 3467. Given the number of reviewing partners, the evaluations often contain a wide range of divergent views.

These evaluations are then compiled and summarized by the firm's administrative staff and organized in books for review by the Associates Committee. *Ezold I*, 751 F. Supp. at 1181 (FOF 52). Each member of the Associates Committee is asked to make an initial assessment of the evaluations pertaining to one of the associates or candidates for partnership. That committee

member prepares a form entitled "Committee Member's Associate Evaluation Summary" summarizing his or her personal view of each associate's evaluations. This form is colloquially referred to as the "bottom line" memo. As found by the district court, the bottom line memo "is intended to be [the Associates Committee member's] own personal view of what he has gleaned from the evaluations submitted at the time by the partners who submitted evaluation forms, *plus anything in addition that [the Associates Committee member] has gleaned from any interviews that he has conducted with respect to those evaluations*." *Id.* at 1181 (FOF 53) (emphasis in original). The bottom line memo also contains a "grid" reflecting the Associates Committee member's summary of the evaluated associate's grades in legal and personal skills.

The bottom line memo also assesses a senior associate's prospects for regular partnership (Category VI) under the following ratings: "more likely than not," "unclear," "less likely than not" or "unlikely." In 1987 and 1988, similar rankings were used to determine the associate's potential for special partnership (Category VII). The Category VII partnership then in existence conferred a non-equity "partnership" status upon associates who fell below the normal standard for admission as equity partners but whose work nevertheless was making a valuable contribution to the firm. *See id.* at 1177 (FOF 15).

Each member of the Associates Committee receives copies of the bottom line memo for all associates before meeting formally to discuss evaluations. The bottom line memo serves as a starting point for the Associates Committee's

discussion of each candidate. The Committee members, using both the bottom line memo and the administrative summaries of the grades and comments, engage in a process of weighing and comparing each associate's legal skills and personal characteristics. The Committee also conducts interviews of those partners who failed to submit written evaluations of an associate during an evaluation period, submitted an evaluation that requires clarification or asked for an opportunity to supplement the written evaluation in an interview.[5] Strogatz testified that the Committee has no formal voting procedure. *Id.* at 1181 (FOF 57). It ultimately reaches its own consensus as to each senior associate's partnership potential and as to each associate's performance. It also formulates a performance review that will be given to each associate and senior associate by a member of the Committee.

The firm's partners evaluated Ezold twice a year as an associate and once a year as a senior associate from October 1983 until the Associates Committee determined that it would not recommend her for partnership in September 1988. The district court found that "[i]n the period up to and including 1988, Ms. Ezold received strongly positive evaluations from almost all of the partners for whom she had done any substantial work." *Id.* at 1182 (FOF 60).[6] In making this finding the district court relied on the evaluations

5. The evaluation form asks the reviewing partner whether he or she would like to "supplement and/or explain [the] written evaluation in an oral interview with a member of the Associates Committee." *See, e.g.*, App. at 3889, 6467.

6. The district court quoted Ezold's evaluations in FOF 61-71.

of Wolf partners Seymour Kurland, Robert Boote, Steve Goodman, Barry Schwartz, Alan Davis and Raymond Bradley. Ezold's overall score in legal skills in the 1988 bottom line memorandum before the Associates Committee was a "G" for good. It was noted that "overall" that year she received "stronger grades in intellectual skills than last time." *Id.* at 1183 (FOF 71).

Evaluations in Ezold's file not mentioned by the district court show that concerns over Ezold's legal analytical ability arose early during her tenure at the firm. In an evaluation covering the period from November 1984 through April 1985, Arbittier wrote:

> I have discussed legal issues with Nancy in connection with [two cases]. I found her analysis to be rather superficial and unfocused. I am beginning to doubt that she has sufficient legal analytical ability to make it with the firm. . . . She makes a good impression with people, has common sense, and can handle routine matters well. However these traits will take you just so far in our firm. I think that due to the nature of our practice Nancy's future here is limited.

App. at 3392. That same year Schwartz wrote:

> I have worked a great deal with Nancy since my last evaluation. . . . Both cases are complex, multifaceted matters that have presented novel issues to us. While her enthusiasm never wanes and she keeps plugging away—I'm often left with a product that demonstrates uncertainty in the analysis of a problem. After extensive discussions with me, the analysis becomes a little more focused, although sometimes I get the sense that

> Nancy feels adrift and is just marching as best she can to my analytical tune. . . . In my view her energy, enthusiasm and fearlessness make her a valuable asset to us. While she may not be as bright as some of our best associates, her talents will continue to serve us well.

Id. at 3392. Also in 1985, partner Donald Joseph rated Ezold's legal analytical ability as marginal and wrote "[i]ts [sic] too early to tell but I have been disappointed on her grasp of the problem, let alone performance." *Id.*

During her next evaluation period from April through November 1985, Ezold received similar negative evaluations. Arbittier, Robert Fiebach and Joseph rated her legal analytical abilities as marginal. Arbittier wrote:

> She took a long time getting [a summary judgment brief] done and I found it to be stilted and unimaginative. One of the main issues—dealing with the issue of notice— she missed completely and did not grasp our position . . . . Also, in considering whether to file a defensive motion . . . she failed to cite me to a clause in the agreement that was highly relevant leaving me with the impression that the motion could not succeed. I think Nancy tries hard and can handle relatively straight-forward matters with a degree of maturity and judgment, but when she gets into more complicated areas she lacks real analytical skill and just does what she is told in a mechanical way. She is not up to our minimal Wolf, Block standards.

Id. at 3376. Boote made the following report on his performance review with Ezold after this evaluation period:

> Nancy appeared to accept the judgment, albeit a little grudgingly, that her analytical, research and writing ability was not up to our standards and that she should focus on the types of matters that she can handle effectively. . . . We made it very clear to Nancy that if she pursues general civil litigation work she is not on track toward partnership and that her only realistic chance for partnership in our opinion is to develop a good reputation for herself in one of the specialized areas of practice.

Id. at 3375.

In the evaluation period covering November 1985 to April 1986, Boote wrote the following to the Associates Committee:

> Nancy continues to get mixed reviews. Her pluses are that she is mature, courageous, pretty good on her feet and has the capacity to inspire confidence in clients. Her minuses are that there is doubt about her analytic and writing ability. . . . In considering Nancy's prospects for the long range, I think we should bear in mind that we have made mistakes in the past in letting people go to other firms who really could have filled a valuable niche here. Whether Nancy is such a person, of course, remains to be seen.

Id. at 3365.

A summary of Ezold's performance review from October 1986 prepared by Schwartz stated:

> Nancy was advised that several of the lawyers feel she has made very positive progress as a lawyer, Sy [Kurland] being one of them. However, he told her that other lawyers had strong negative sentiments about her capabilities and they feel she has a number of shortcomings in the way of complicated analysis of legal problems and in being able to handle the big complicated corporate litigation, and therefore, does not meet the standard for partnership at Wolf, Block. . . . Both Sy and I urged Nancy to seriously consider looking for employment elsewhere as she may not be able to turn the tide.

Id. at 3364.

Although several partners saw improvement in Ezold's work, negative comments about her analytical ability continued up until, and through, her 1988 senior associate evaluation, the year she was considered for partnership. A summary of her evaluations for 1987 and 1988, focusing on the grades and comments she received in the category of legal analysis, follows:[7]

1987 Evaluations

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7. Because the reason Wolf articulated for denying Ezold partnership was lack of legal analytic ability, this summary includes neither positive evaluations in other categories upon which the district court made findings nor evaluations in which there was neither grade nor comment in the category of legal analysis. Many of Ezold's evaluations in other categories were highly complimentary and compared quite favorably to the partners' evaluations of male candidates for partnership in the same categories. The district court's use of these other favorable evaluations in the comparative analysis in support of its ultimate finding of pretext is discussed in Part VII of this opinion, *infra*.

Partner Name	*Grade (Legal Analysis)*	*Comments*
Promislo	M	"I had minimal contact with Nancy, but I thought she did not generate ideas . . . or pull the facts together well and exercise the best lawyerly judgement. She seemed somewhat over her head, but I don't think she should have been." Recommended partnership with "negative feelings." *Id.* at 3854-57.
Kurland		"[T]here seems to be serious question as to whether she has the legal ability to take on large matters and handle them on her own. We have been over this many times and there is nothing I can add to what I've already said about Nancy. What I envisioned about her when I hired her as a "good, stand-up effective courtroom lawyer" remains to be true and I think she has proven her case. Apparently she has not proved to the satisfaction of the firm the other qualities considered necessary to rise to the top of the firm." Recommended partnership "with mixed emotions." *Id.* at 3878-81.[8]

8. The district court omitted from its findings this portion of Kurland's evaluation concerning Ezold's legal analytical ability.

Alderman	A	Slight contact. Recommended partnership with "negative feelings." *Id.* at 3886-89.
Boote	A	"Nancy has avoided demonstrating ability in th[e] area [of legal analysis] because I believe she lacks it. On the other hand, in Nancy's case, other qualities redeem her. . . . I would not want her in charge of a large legally complex case, the traditional measure of a Wolf Block partner." Recommended partnership "with favor." *Id.* at 3894-97.[9]
Flaherty	A	Slight contact. Recommended partnership with "mixed emotions." *Id.* at 3918-21.
Joseph		"I have been singularly unimpressed with the level of her ability. . . . She may be fine to keep for certain smaller matters, but I don't see her skills as being those for our sophisticated practice." *Id.* at 3930-33. Recommended partnership with "negative feelings." *Id.* at 3933.
Schwartz	G	"She is excellent in court and loves to be in that arena. . . . She remains a little weak in her initial

9. The district court omitted this portion of Boote's evaluation from its finding.

		analysis of complex legal issues." *Id.* at 3954-56.[10]
Dubrow	A	"[I]n my one experience we lost a client, but I think Nancy performed satisfactorily." No opinion as to partnership admission. *Id.* at 3990-93.
Roberts	G	Slight contact. Recommended partnership "with favor." *Id.* at 4052-55.
Spitzer	G	"Little contact, most favorable impression." Recommended partnership "with favor." *Id.* at 4060-63.

During the 1987 evaluation period, two partners viewed Ezold's eventual admission to the partnership "with enthusiasm," sixteen "with favor," eight "with mixed emotions" and seven with "negative feelings." *Id.* at 3346. The Associates Committee formed a consensus that Ezold's analytical ability fell below the firm's standards. It predicted her partnership chances as "unclear" and if she was made a partner it would most likely be a Category VII partner because there was substantial doubt as to her legal ability. *Id.* at 3349. At trial Ezold acknowledged that during her evaluation meeting for this period she was told that "there were partners who criticized [her] writing ability and questioned [her] ability to handle complex litigation, perhaps criticized or

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10. The district court omitted this comment on legal analysis from its finding.

questioned [her] ability in the area of legal analysis." *Id.* at 666.

1988 Evaluations

Name	Partner Grade (Legal Analysis)	Comments
Rosenblum	A	"On a very complicated matter primarily involving financial analysis, I am not sure whether or not [Ezold] grasped analysis fully. (I am not sure that others working on project did either . . . .)." Recommended partnership with "mixed emotions." *Id.* at 3488-91.
Temin	A	Slight contact. Recommended partnership "with mixed emotions." *Id.* at 3508-11.
Davis	A	"She will never be a legal scholar—but we have plenty of support in that area." Recommended partnership with "enthusiasm." *Id.* at 3512-15.
Arbittier	A	"Barely adequate legal skills"; "Her abilities are limited. She makes a good impression but she lacks real legal analytical ability." Recommended partnership with "mixed emotions." *Id.* at 3520-23.
Fiebach	M	"Nancy has certain strengths . . . . If directed, she will do a good job—except that she has

		limitations with respect to complex legal issues. However, when left on her own she does not do what has to be done until [the] case is in crisis and she does a poor job in keeping [the] client informed." Recommended partnership with "negative feelings." *Id.* at 3544-47.
Goldberger		Would feel comfortable turning over a significant matter for one of his clients "if not too complex." "Nancy reputedly can handle many of our matters on her own. If so and reliable others bear these rumors out, partnership may be in the cards." Recommended partnership with "mixed emotions." *Id.* at 3552-55.
Joseph		"[H]er abilities to grasp legal issues from the little I observed was insufficient to trust her in major litigation on her own." Recommended partnership with "negative feelings." *Id.* at 3560-63.
Poul	G	Slight contact. Recommended partnership "with favor." *Id.* at 3580-83.
Simon		"Probably ancient history—but I do recall my perception that she does not write well and lacks intellectual sophistication." Recommended partnership with

"negative feelings." *Id.* at 3596-99.

Fala	G	"Nancy handled a moderate sized lawsuit for a client of mine. Job was done well and responsibly. Result was good." *Id.* at 3656.
Roberts	G	Slight contact; recommended partnership with "mixed emotions." *Id.* at 3688-91.
Garber		"Experience with her years ago was unsatisfactory." No opinion on partnership recommendation. *Id.* at 3756-59.
Berriman	G	Slight contact; recommended partnership "with enthusiasm." *Id.* at 3776-79.
Kaplinsky	A	"She has done a very nice job on the Home Unity shareholder litigation. . . . I am probably not as complimentary as Alan [Davis] might be. I was never convinced that she had a complete grasp of the accounting issues in the case." Recommended partnership "with favor." *Id.* at 3452-55.
McConomy	G	"Only worked on one matter for me. She is doing a super job." Recommended partnership "with favor." *Id.* at 3464-67.

In 1988, ninety-one partners submitted evaluations of Ezold. Thirty-two, a little more than one-third, made recommendations with varying

degrees of confidence, for Ezold's admission to partnership. Seven of those partners recommended that Ezold be made a partner "with enthusiasm," fourteen "with favor," six with "mixed emotions," four with "negative feelings," and one with "mixed emotions/negative feelings." *Id.* at 3318. Three of the four partners who voted for partnership with negative feelings were members of Ezold's department. After reviewing Ezold's evaluations and conducting interviews, the Associates Committee voted 9-1 not to recommend Ezold for Category VI partnership.[11]

In a discussion initiated by Davis, the Associates Committee also debated modifying the partnership standard as a matter of general policy or specially in Ezold's case because of her other positive attributes. Davis believed:

> although [Ezold] was not up to par on her legal analytical ability, . . . deficiencies in a particular area, even though it was a traditional area where we required a certain superior level, could be overlooked or relaxed to where there were sufficiently compensating skills in other areas, because I felt as chairman that in staffing a case, I could put together the right skills, and we had enough business where we could fit everybody in usefully and productively.

Id. at 1665, 1686. He thought the firm "just ought to come off [its] standards and be a little more creative in melding different abilities that different

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11. Roberta Liebenberg, a female litigation partner, voted against Ezold's admission. The only Associates Committee member voting in favor of Ezold was her former neighbor, Ronald Weiner.

people might bring." *Id.* at 1685. The other Committee members ultimately rejected this suggestion.

The Associates Committee told Ezold that she would not be recommended for admission as a "Group VI" regular partner effective February 1, 1989 because "too many partners did not believe she had sufficient legal analytical ability to handle complex legal issues." *Ezold I*, 751 F. Supp. at 1189 (FOF 136). It did vote, however, to recommend her for the status of "Group VII" special partner that the firm had heretofore made available to associates who are valuable but fall below the firm's high standards for full partnership.[12] The continuing existence of that category was, however, then under review by the firm's Executive Committee. It was in fact later eliminated.

Out of a total of eight candidates in Ezold's class, five male associates and one female associate were recommended for regular partnership. One male associate, Associate X, was not recommended for either regular or special partnership.

The Executive Committee decided to review the Associates Committee's negative recommendation of Ezold and also to conduct an independent review of the negative recommendation of Associate X.[13] William Rosoff, former chairman of the

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12. "Special partners," in contrast to regular partners, do not have the right to vote, do not have any equity in the partnership and may be removed by the Executive Committee. In addition, the benefits provided are inferior to those of regular partners. *Ezold I*, 751 F. Supp. at 1177 (FOF 15).

13. It is not clear from the record whether such an inquiry

Executive Committee, conducted the inquiry. Rosoff reviewed Ezold's evaluation documents and interviewed four litigation department partners: Schwartz, Boote, Arbittier and Fiebach. Rosoff had learned of the policy disagreement among some of the firm's partners as to whether the partnership standard should be relaxed in light of Ezold's other attributes. He reported to the Executive Committee that it should not recommend Ezold's admission unless it was prepared to reduce the firm's partnership standards. The 5-member Executive Committee voted unanimously not to recommend Ezold's admission as a regular partner.

On November 16, 1988 Executive Committee Chairman Charles Kopp met with Ezold and informed her of the decision. He also told her that two domestic relations partners had informed the Committee several days earlier that they were leaving the firm and that this immediate vacuum presented an opportunity for her. *Id.* at 1189 (FOF 137). He promised that if she agreed to work in this department, she would be made a regular partner in one year. Other associates passed over for partnership in the past had sometimes agreed to specialize in a certain area where the need arose and had later made partner. Although Kopp had little contact with Ezold, he believed that Ezold could handle the work because of the positive evaluations of her skills with clients and in the courtroom and because the practice area did not require the same complex analysis as the firm's commercial litigation practice. *See id.* at 1189

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is a matter of course in connection with negative partnership recommendations.

(FOF 137-38).[14] Ezold declined the offer. Kopp told Ezold that the firm nevertheless wanted her to stay and she could stay on as a litigation associate as long as she wanted. *Id.* at 1189 (FOF 139).

Ezold also met with Rosoff concerning the domestic relations offer. The district court found that Rosoff "told her that although he could not assure her of a partnership in the future if she declined the domestic relations partnership offer, she would be considered for partnership in the future." *Id.* at 1190 (FOF 142). He also told her that she would receive a substantial pay raise the following July when semi-annual raises are given to associates, but she would not receive the pay raise being given to the other members of her class who were recommended for partnership.[15]

Ezold remained at the firm, none of her cases were taken away from her, and Davis, then chair of the Litigation Department and one of Ezold's supporters, continued to assign her new cases. On January 25, 1989, one day after the firm's

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14. Ezold testified that Kopp told her that she could learn the area of the law in a week. Ezold contended that the offer of a position in domestic relations, a position with allegedly less esteem in the firm, is also evidence of discrimination. The district court found this department was formerly headed by a male, and is currently headed by two male senior partners. *Ezold I*, 751 F. Supp. at 1190 (FOF 143). We believe this abrogates the inference of discrimination Ezold would have us draw.

15. After the Associates Committee determined that it would not be recommending Ezold for partnership, it was decided not to give her the September 1988 raise given to those in her class who were promoted. Ezold's salary as a senior associate was $73,000.00. The lowest level regular partner earns between $125,000.00 and $140,000.00 a year.

partners voted on the admission of new partners, Ezold began looking for other employment. She ultimately signed a one-year contract as president of an environmental consulting firm, a former client of Wolf, and also took an "of counsel" position with a suburban law firm. Ezold resigned from the firm on June 7, 1989.

III.

The district court had subject matter jurisdiction under 28 U.S.C.A. § 1331 (West Supp. 1992) and 42 U.S.C.A. § 2000e-5(f)(3) (West 1981). We have jurisdiction over the final orders of the district court pursuant to 28 U.S.C.A. § 1291 (West Supp. 1992).

IV.

Ezold claims Wolf intentionally discriminated against her because of her sex. Intentional discrimination in employment cases fall within one of two categories: "pretext" cases and "mixed-motives" cases. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 247 n.12 (1989) (plurality). In pretext cases, the familiar *McDonnell Douglas/Burdine* analysis applies. In a mixed motives case the *McDonnell Douglas/Burdine* analysis does not apply, and the plaintiff has the burden of showing by direct evidence that an illegitimate factor had a "motivating" or "substantial" role in the employment decision. *Id.* at 258. This theory has been codified in the Civil Rights Act of 1991. *See* 42 U.S.C.A. § 2000e-2(m) (West Supp. 1992). If the plaintiff makes such a showing, the burden shifts to the employer to prove by a preponderance of the evidence "that it would have reached the same [employment]

decision . . . even in the absence of" the impermissible factor. *Hopkins*, 490 U.S. at 244-45. There is some uncertainty in the law about the sort of direct evidence a plaintiff must show to shift the burden to an employer in a mixed motives case, *see Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1183 (2d Cir.), *cert. denied*, 60 U.S.L.W. 3860 (U.S. Oct. 5, 1992) (No. 91-1975), but we need not address that issue here as Ezold proceeded only under the *McDonnell Douglas/Burdine* framework. *See* Transcript of Oral Argument, at 46-47 ("Your Honor . . . I intended to say that this case followed standard McDonnell Douglas and Burdine. . . . This is a pretext case."). This is not a mixed-motive case. The issue in this case is "whether illegal or legal motives, but not both, were the 'true' motives behind the [partnership] decision." *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 49 (3d Cir. 1989); *see also Price Waterhouse*, 490 U.S. at 260 (White, J., concurring).

Therefore, before considering Wolf's contentions, we think it wise to revisit the alternating burdens of proof in a Title VII discrimination case under the now familiar process set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981). *See, e.g., Bennun v. Rutgers State Univ.*, 941 F.2d 154, 170 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 956 (1992); *Roebuck v. Drexel Univ.*, 852 F.2d 715, 726-27 (3d Cir. 1988). Ezold relied on this particular method of circumstantial proof of discrimination at trial. The plaintiff must first establish by a preponderance of the evidence a prima facie case of discrimination. *Burdine*, 450 U.S. at 252;

Bellissimo v. Westinghouse Elec. Corp., 764 F.2d 175, 179 (3d Cir. 1985), *cert. denied*, 475 U.S. 1035 (1986), *abrogated on other grounds*, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The plaintiff can establish a prima facie case by showing that she is a member of a protected class; that she was qualified for and rejected for the position; and that non-members of the protected class were treated more favorably. *Roebuck*, 852 F.2d at 726 (citing *McDonnell Douglas*, 411 U.S. at 802); *see Burdine*, 450 U.S. at 252-53. After the plaintiff has established a prima facie case, the burden shifts to the defendant to produce evidence of a legitimate, nondiscriminatory reason for the employee's rejection. *Burdine*, 450 U.S. at 252; *Bellissimo*, 764 F.2d at 179. If the defendant's evidence creates a genuine issue of fact, the presumption of discrimination drops from the case. *Burdine*, 450 U.S. at 254-55; *Bellissimo*, 764 F.2d at 179. Then, the plaintiff, since she retains the ultimate burden of persuasion, must prove, by a preponderance of the evidence, that the defendant's proffered reasons were a pretext for discrimination. *Burdine*, 450 U.S. at 257; *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 898 (3d Cir.) (in banc), *cert. denied*, 483 U.S. 1052 (1987); *Bellissimo*, 764 F.2d at 180.

The parties do not dispute the district court's conclusion of law that Ezold demonstrated a prima facie case, in particular that she was "qualified" for admission to the partnership. While "more than a denial of promotion as a result of a dispute over qualifications" must be shown to prove pretext, *see Molthan v. Temple Univ.*, 778 F.2d 955, 962 (3d Cir. 1985), such a dispute will satisfy the plaintiff's prima facie hurdle of establishing qualification as

long as the plaintiff demonstrates that "[s]he was sufficiently qualified to be among those persons from whom a selection, to some extent discretionary, would be made." *Bennun*, 941 F.2d at 171 (quoting *Roebuck*, 852 F.2d at 726). In Title VII cases involving a dispute over "subjective" qualifications, we have recognized that the qualification issue should often be resolved in the second and third stages of the *McDonnell Douglas/Burdine* analysis, to avoid putting too onerous a burden on the plaintiff in establishing a prima facie case, but we have refused to adopt a blanket rule. *Fowle v. C & C Cola*, 868 F.2d 59, 64 (3d Cir. 1989). Because the prima facie case is easily made out, it is rarely the focus of the ultimate disagreement. *Healy v. New York Life Ins. Co.*, 860 F.2d 1209, 1214 n.1 (3d Cir. 1988), *cert. denied*, 490 U.S. 1098 (1989). We agree with the district court's conclusion that favorable evaluations from partners with whom Ezold worked, and a score of "G" on her 1988 bottom line memo, demonstrate that she was qualified for partnership consideration. *See Ezold I*, 751 F. Supp. at 1191 (COL 6).

The defendant may rebut the presumption of discrimination arising out of the plaintiff's prima facie case by producing evidence that there was a "legitimate, nondiscriminatory reason" why the plaintiff was rejected. *Burdine*, 450 U.S. at 254; *McDonnell Douglas*, 411 U.S. at 802. The Supreme Court in *Burdine* said:

> [T]he defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to

> justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. . . .

450 U.S. at 255-56.

The burden then shifts to the plaintiff to show that the defendant's articulated reasons are pretextual. *Id.* at 256. This burden merges into the plaintiff's ultimate burden of persuading the court that she has been the victim of intentional discrimination. *Id.* The plaintiff must demonstrate "by competent evidence that the presumptively valid reason[] for [the alleged unlawful employment action] [was] in fact a coverup for a . . . discriminatory decision." *McDonnell Douglas*, 411 U.S. at 805. Explicit evidence of discrimination—*i.e.*, the "smoking gun"—is not required. *See Bennun*, 941 F.2d at 171; *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 48 (3d Cir. 1989). A plaintiff can establish pretext in one of two ways: "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered reason is unworthy of credence." *Burdine*, 450 U.S. at 256.

In proving that the employer's motive was more likely than not the product of a discriminatory

reason instead of the articulated legitimate reason, sufficiently strong evidence of an employer's past treatment of the plaintiff may suffice. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 188 (1989);[16] *McDonnell Douglas*, 411 U.S. at 804. The employer's "general policy and practice with respect to minority employment" may also be relevant. *McDonnell Douglas*, 411 U.S. at 804-05. Alternately, if a plaintiff produces credible evidence that it is more likely than not that "the employer did not act for its proffered reason, then the employer's decision remains unexplained and the inferences from the evidence produced by the plaintiff may be sufficient to prove the ultimate fact of discriminatory intent." *Chipollini*, 814 F.2d at 899.

Wolf's articulated nondiscriminatory reason for denying Ezold's admission to the partnership was that she did not possess sufficient legal analytical skills to handle the responsibilities of partner in the firm's complex litigation practice. Ezold attempted to prove that Wolf's proffered explanation was "unworthy of credence" by showing she was at least equal to, if not more qualified than, similarly situated males promoted to partnership. She also contended that her past

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16. This statement in *Patterson* is in conformity with the law that pre-existed *Patterson* and is not affected by the Civil Rights Act of 1991. *See Rush v. McDonald's Corp.*, 966 F.2d 1104, 1119-20 (7th Cir. 1992) (section 101 of Civil Rights Act of 1991 overturns portion of *Patterson* holding that proscription of racial discrimination in making of contract under 42 U.S.C.A. § 1981 applies only to refusals to hire and promotions rising to level of opportunity for "new and distinct relation" between employer and employee) (quoting *Patterson*, 491 U.S. at 185)).

treatment at the firm showed Wolf's decision was based on a discriminatory motive rather than the legitimate reason of deficiency in legal analytical ability that the firm had articulated.

V.

From this overview of the law, we turn to the specifics of the district court's analysis, its findings and the parties' contentions concerning them. The district court compared Ezold to eight successful male partnership candidates, Associates A-H. It found:

> The test that was put to the plaintiff by the Associates Committee that she have outstanding academic credentials and that before she could be admitted to the most junior of partnerships, she must demonstrate that she had the analytical ability to handle the most complex litigation was not the test required of male associates.

Ezold I, 761 F. Supp. at 1183 (FOF 73). The district court then concluded:

> Ms. Ezold has established that the defendant's purported reasons for its conduct are pretextual. The defendant promoted to partnership men having evaluations substantially the same or inferior to the plaintiff's, and indeed promoted male associates who the defendant claimed had precisely the lack of analytical or writing ability upon which Wolf, Block purportedly based its decision concerning the plaintiff. The defendant is not entitled to apply its standards in a more "severe" fashion to female associates. . . . Such differential treatment establishes that the

defendant's reasons were a pretext for discrimination.

Id., at 1191-92 (COL 11) (citations omitted).

Wolf says this finding of pretext is wrong. Analyzing its contentions, we perceive two reasons why this is so. First, the district court's finding that Ezold was required to have outstanding academic credentials before she could be admitted to partnership is without factual support in the record. The only evidence in the record that Wolf considered Ezold's academic record is limited to the original decision to hire Ezold and to assignments given to Ezold early in her employment with Wolf, issues we consider in Part IX, *infra*. Second, in its analysis, the district court did not focus on Wolf's articulated reason for denying Ezold partnership—lack of analytic ability to handle complex litigation. Instead, the district court first substituted its own general standard for the qualities Wolf believed were essential to law firm partnership. Then, applying its own incorrect standard of comparison, the district court did not realize that a comparison of Ezold's legal analytic ability with that of the successful males could not support a finding of pretext. Overall, Ezold's evaluations in that category were not as good as that of even the least capable male associate who was offered a partnership position.

VI.

Wolf contends that in all aspects of its analysis the district court improperly substituted its own subjective judgment—not only concerning what the firm's partnership standard should be—but also concerning whether Ezold met this standard.

Specifically, it alleges that the district court ignored the negative evaluations concerning Ezold's legal analytical ability that are in the record; looked beyond the criterion of legal analysis, Wolf's articulated nondiscriminatory reason, in comparing Ezold to male associates admitted to the partnership; failed to make findings concerning male associates denied admission to the partnership based on their deficient legal analytical ability; and excluded from evidence the evaluation files of female associates admitted to the partnership who received criticisms similar to male associates admitted to the partnership in areas other than legal analysis. Initially, Wolf argues our review of these issues is plenary.

Wolf relies on *Logue v. International Rehabilitation Associates, Inc.*, 837 F.2d 150 (3d Cir. 1988), for the proposition that we exercise plenary review over the district court's determinations on these questions. Ezold responds that Wolf is trying to obtain plenary review by couching a challenge to the sufficiency of the evidence as legal error in the selection of the appropriate standards for determining discrimination. In *Logue* the defendant asserted on appeal that the district court incorrectly applied the legal standard for sex discrimination by failing to address and make findings of fact on all of the legitimate, nondiscriminatory reasons it offered in support of its termination of the plaintiff's employment. *Id.* at 153. We held that by failing to address all of the defendant's proffered reasons the district court erred as a matter of law, misapplied the legal standard governing sex discrimination

and deprived the defendant of the full trial process contemplated by *Burdine*. *Id.* at 154.

This case is distinguishable from *Logue*. Here, the district court did consider Wolf's articulated nondiscriminatory reason and did make findings upon it. Wolf contends the district court's findings are incomplete and that those it did make do not support its ultimate finding of pretext. Plenary review is appropriate in order to determine the extent to which essential findings are missing. The district court's refusal to credit or make findings concerning all of Wolf's proffered evidence, however, does not subject its express findings to plenary review. Those findings cannot be set aside unless they are clearly erroneous. A finding becomes clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). When there are two permissible views of the evidence, the district court's choice of one view cannot be clearly erroneous. *Id.* at 574.

The district court's resolution of the ultimate issue whether Wolf's reason for denying Ezold's admission to the partnership was a pretext is a finding of fact subject to the clearly erroneous standard set forth in Federal Rule of Civil Procedure 52(a). *See id.* at 573; *Bellissimo*, 764 F.2d at 179. We may reverse the district court on this finding of fact only if the evidence is insufficient to permit a rational factfinder to infer that Wolf's assertion that Ezold was wanting in

legal analytic ability was a mask for unlawful sex discrimination.

Wolf's disagreement with the method of analysis the district court employed leads naturally to its challenge to the sufficiency of the evidence to support the district court's finding of pretext and its ultimate conclusion of unlawful discrimination. Thus, Wolf contended at oral argument before this Court: "[t]here is no proof, in this case, of a gender-driven result." Transcript at 59. In considering a challenge to the sufficiency of the evidence, we must determine based on our own "comprehensive review of the entire record" whether Ezold has satisfied her ultimate burden of proving intentional sex discrimination. *Bennun*, 941 F.2d at 170; *Bellissimo*, 764 F.2d at 178-79. In doing so, we view the evidence in the light most favorable to Ezold. *See Roebuck*, 852 F.2d at 727-28 (citing *Dreyer v. Arco Chem. Co.*, 801 F.2d 651, 654 (3d Cir. 1986), *cert. denied*, 480 U.S. 906 (1987)). We again defer to the district court's factual findings, including once more its ultimate finding, and we cannot reverse any of them unless they are clearly erroneous. *Bellissimo*, 764 F.2d at 178-79.

VII.

Wolf's articulated reason for refusing to offer Ezold a partnership was its belief, based on a subtle and subjective consensus among the partners, that she did not possess sufficient legal analytic ability to handle complex litigation. Wolf never contended that Ezold was not a good courtroom lawyer, dedicated to her practice, and good with clients. Instead, many partners felt, because of the level of her legal analytical ability,

that she could not handle partnership responsibilities in the firm's complex litigation practice. Absent evidence to show that legal analytic ability was not a necessary precondition for partnership at Wolf, the district court's opinion about Ezold's comparative strengths in the other categories on the evaluation form is immaterial.

A.

The record does not show that anyone was taken into the partnership without serious consideration of their strength in the category of legal analytic ability.[17] The evaluations specifically asked each partner whether he or she would feel comfortable turning over to the partnership candidate "to handle on his/her own a significant matter for one of my clients." *See* App. at 3423. Several of the partners' responses to this question on Ezold's evaluations show clear concern about the depth of her legal analytical capabilities. *See, e.g.*, App. at 3348 ("I would not want her in charge of a large legally complex case, the traditional measure of a Wolf, Block partner."). This same question, reflecting a requirement that an applicant exhibit analytical abilities sufficient to meet Wolf's perception of the firm's standard, was considered throughout the firm's evaluations of the male associates with whom Ezold was competing. *See, e.g.*, App. at 4257 ("I just am concerned if he could 'first chair' a case."); App. at 4823 ("He [Associate H] can handle the most complex litigation we

17. Though the record indicates that perceived legal analytic ability is a necessary condition for partnership at Wolf, it, in and of itself, is not a necessary and sufficient condition. Otherwise, the remaining categories on the evaluation form would be superfluous.

have."); App. at 4532 ("Based on [Associate C's] ability to analyze a legal problem I could feel comfortable in turning over my best client to him for a significant matter."); App. at 5044 ("[There are] questions about his intellectual strength, his ability to manage complex transactions and his level of attention to detail"); App. at 4696 ("[H]e just doesn't have the high level of intelligence we need to handle complex legal questions."). Ezold herself acknowledged at trial that because of the nature of Wolf's litigation practice, its litigators devote much more time to legal analysis than in-court trial work.

Davis, a member of the Associates Committee who favored partnership for Ezold, testified that he recognized her shortcomings in the area of legal analytic ability. Thus, he advocated a relaxation of the partnership standard to accommodate her because he believed that her other skills "outweighed whatever deficiencies she had in the legal ability area." App. at 1684. The Associates Committee and the Executive Committee ultimately refused to relax the firm's standards. Such a refusal to relax standards, however, is not evidence of discrimination.

Wolf reserves for itself the power to decide, by consensus, whether an associate possesses sufficient analytical ability to handle complex matters independently after becoming a partner. It is Wolf's prerogative to utilize such a standard. In *Billet v. CIGNA Corp.*, 940 F.2d 812 (3d Cir. 1991), an age discrimination case, we stated that "[b]arring discrimination, a company has the right to make business judgments on employee status, particularly when the decision involves subjective factors deemed essential to certain positions." *Id.*

at 825. We stated again that "[a] plaintiff has the burden of casting doubt on an employer's articulated reasons for an employment decision. Without some evidence to cast this doubt, this Court will not interfere in an otherwise valid management decision." *Id.* at 828 (citing *Lucas v. Dover Corp.*, 857 F.2d 1397, 1403-04 (10th Cir. 1988) (a court will not second guess business decisions made by employers, in the absence of some evidence of impermissible motives)); *see Loeb v. Textron, Inc.*, 600 F.2d 1003, 1012 n.6 (1st Cir. 1979) ("While an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is simply whether the given reason was a pretext for illegal discrimination.").

The partnership evaluation process at Wolf, though formalized, is based on judgment, like most decisions in human institutions. A consensus as to that judgment is the end result of Wolf's formal process. In that process, the Associates Committee has the role of collecting and weighing hundreds of evaluations by partners with diverse views before reaching its consensus as to a particular associate's abilities. The consensus the Associates Committee reaches is then passed on to the Executive Committee. After its review and, at least in Ezold's case, additional independent investigation, the Executive Committee submits its final recommendation to the partners for a vote.

The differing evaluations the partners first submit to the Associates Committee are often based on hearsay or reputation. No precise theorem or specific objective criterion is employed. *Cf. Bennun*, 941 F.2d at 179 (not "unwarranted invasion" of college's tenure process for district court "to determine that [professor] was held to

higher standards in *objective terms*, *i.e.* number of publications") (emphasis added). We have cautioned courts on several occasions to avoid unnecessary intrusion into subjective promotion decisions in the analogous context of academic tenure. While such decisions are not insulated from judicial review for unlawful discrimination,

> it is clear that courts must be vigilant not to intrude into that determination, and should not substitute their judgment for that of the college with respect to the qualifications of faculty members for promotion and tenure. Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professionals . . . .

Id. at 181 (Sloviter, C.J., dissenting from denial of petition for rehearing) (quoting *Kunda v. Muhlenberg College*, 621 F.2d 532, 548 (3d Cir. 1980)). These cautions against "unwarranted invasion or intrusion" into matters involving professional judgments about an employee's qualifications for promotion within a profession inform the remainder of our analysis.

B.

In Ezold's case, the district court correctly recognized the legal premise that should have governed its result: Title VII prohibits only "discrimination." Therefore, "consideration of the practices of the [firm] toward the plaintiff must be evaluated in light of its practices toward the

allegedly more favored group, in this case males." *Kunda*, 621 F.2d at 538.

The district court, however, failed to apply this legal premise to the evidence before it. It disagreed not only with Wolf's assessment of Ezold's ability to meet Wolf's standards, but also with Wolf's partnership standards themselves. For example, it found:

> In the magnitude of its complexity, a case may have a senior partner, a younger partner, and an associate(s) assigned to a case. Accordingly, requiring the plaintiff to have the ability to handle on her own any complex litigation within the firm before she was eligible to be a partner was a pretext.

Ezold I, 751 F. Supp. at 1188 (FOF 121). The district court disagreed with Wolf's decision not to overlook Ezold's deficiency in legal analysis because of her other skills and attributes, but the court is not a member of Wolf's Associates Committee or Executive Committee. Its belief that Wolf's high standard of analytical ability was unwise in light of the staffing of senior partners on complex cases does not make Wolf's standard a pretext for discrimination.

The evaluations that the district court did rely upon in making its finding of pretext praised Ezold for skills other than legal analysis, such as client relations and ability in court, that Wolf never disputed she possessed. Where an employer produces evidence that the plaintiff was not promoted because of its view that the plaintiff lacked a particular qualification the employer deemed essential to the position sought, a district court should focus on the qualification the

employer found lacking in determining whether non-members of the protected class were treated more favorably. Without such a limitation, district courts would be routinely called upon to act as members of an employer's promotion board or committee. It would subjectively consider and weigh all the factors the employer uses in reaching a decision on promotion and then make its own decision without the intimate knowledge of the history of the employer and its standards that the firm's decisionmakers use in judging the degree to which a candidate exhibits a particular qualification that the employer has decided is of significance or primary importance in its promotion process. Pretext is not established by virtue of the fact that an employee has received some favorable comments in some categories or has, in the past, received some good evaluations. *See, e.g., Billet*, 940 F.2d at 826; *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 343-44 (3d Cir. 1990); *Healy*, 860 F.2d at 1215; *see also Frieze v. Boatmen's Bank*, 950 F.2d 538, 541 (8th Cir. 1991) ("An employer rating an employee as competent discredits the employer's stated reason for discharging the employee, however, only when the employer's stated reason is the employee's *general* incompetence.") (emphasis added). It was not for the district court to determine that Ezold's skills in areas other than legal analysis made her sufficiently qualified for admission to the partnership.

The district court's method of comparing Ezold to "similarly situated" male associates admitted to the partnership points up this initial flaw in its analysis. It engaged in a "pick and choose" selection of various comments concerning the male

associates' personalities, work habits, and other criteria besides legal analysis, conducted its own subjective weighing process and then found that "[m]ale associates who received evaluations no better than [Ezold] and sometimes less favorable than [her] were made partners." *Ezold I*, 751 F. Supp. at 1184 (FOF 75). In doing so, the district court made no reference to the many favorable evaluations of the analytical ability of these male associates.

Hopkins v. Price Waterhouse, 618 F. Supp. 1109 (D.D.C. 1985), *aff'd in relevant part*, 825 F.2d 458 (D.C. Cir. 1987), *rev'd on other grounds*, 490 U.S. 228 (1989) (plurality), is instructive. There the dispute centered in part on whether Price Waterhouse's concern about the plaintiff's interpersonal skills was a legitimate, nondiscriminatory reason to deny her partnership, or whether it was unworthy of credence. The district court held that "[i]t is clear that the complaints about the plaintiff's interpersonal skills were not fabricated as a pretext for discrimination." 618 F. Supp. at 1114. Contemporaneous evaluations "conducted well before the plaintiff was proposed for partnership" reflected numerous criticisms of her interpersonal skills, and "[e]ven partners who strongly supported her partnership candidacy acknowledged these deficiencies." *Id.* The plaintiff in *Hopkins* had contended that men with problems in interpersonal skills were invariably admitted to the partnership. The district court disagreed, stating:

> [T]he plaintiff has identified two male candidates who were criticized for their interpersonal skills because they were perceived as being aggressive,

> overbearing, abrasive or crude, but were recommended by the Policy Board and elected partner. Price Waterhouse points out that in both cases the Policy Board expressed substantial reservations about the candidates' interpersonal skills but ultimately made a "business decision" to admit the candidates because they had skills which the firm had a specific, special need [for] and the firm feared that their talents might be lost if they were put on hold. . . . In addition, these candidates received fewer evaluations from partners recommending that they be denied partnership and the negative comments on these candidates were less intense than those directed at the plaintiff.

Id. at 1115.[18]

The district court's comparison of Ezold with the successful male candidates in categories other than legal analytic ability does not lend support to its ultimate finding of pretext. The district court could not overturn Wolf's judgment that Ezold did not meet its standards for legal analytic ability without finding that Wolf's conclusions as to Ezold's legal analytic ability were pretextual. That finding, in order to stand, has to be based on evidence showing either that Wolf's asserted reason for denying Ezold a partnership position was not credible—either through comparison of her ability in that category, as Wolf perceived it, with

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18. We recognize that the conclusions in the statement we quote from *Hopkins* were made by the factfinder. Nevertheless, we think the quoted language, correctly setting forth the basis on which comparison must be made, reflects the legal standard that the district court was required to apply to the evidence before it in Ezold's case.

the successful male associates, or by evidence showing that Wolf's decision not to admit Ezold to the partnership was more likely motivated by a discriminatory reason than by her shortcomings in legal analytic ability.

C.

Were the factors Wolf considered in deciding which associates should be admitted to the partnership objective, as opposed to subjective, the conflicts in various partners' views about Ezold's legal analytical ability that this record shows might amount to no more than a conflict in the evidence that the district court as factfinder had full power to resolve. The principles governing valid comparisons between members of a protected minority and those fortunate enough to be part of a favored majority reveal an obvious difficulty plaintiffs must face in an unlawful discrimination case involving promotions that are dependent on an employer's balanced evaluation of various subjective criteria. This difficulty is the lack of an objective qualification or factor that a plaintiff can use as a yardstick to compare herself with similarly situated employees. In *Bennun*, the reason Rutgers assigned for denying Bennun's promotion to the position of tenured professor was the "poor quality and insufficient quantity of his research." *Bennun*, 941 F.2d at 177. Because Bennun's research product could be measured against the judgment of his academic peers and, by that judgment, objectively compared with the research of a successful candidate for professor, Bennun was able to show the reason the University advanced for denying him the rank of professor was incredible. He did so by proving that

he had published a higher number of articles than the similarly situated non-hispanic member of the faculty who had been granted professorial rank and that his articles had received more favorable reviews from internationally known scholars. *Id.* By objectively comparing Bennun's published research with that of the favored candidate, the district court rationally found that Bennun was held to higher standards than a non-Hispanic. This Court held that this finding was not clearly erroneous and thus laid a proper foundation for the district court's circumstantial inference that Rutgers' articulated reason for denying Bennun promotion was a pretext. *Id.* at 179-80.

Similarly, in *Kunda*, the district court held that Muhlenberg's asserted reason for not promoting Kunda, lack of a master's degree, "was pretextual in view of its promotion of male members of the department who did not have masters' degrees." 621 F.2d at 539. We affirmed, stating:

> Muhlenberg's attempt to explain and distinguish each of the three situations [in which male members without master's degrees were promoted] raised a factual issue which the trier of fact decided against it. We cannot say that the record is barren of any evidence to support the trial court's findings, and therefore will affirm its ultimate conclusion that plaintiff was discriminated against on the basis of sex in the denial of a promotion.

Id. at 545.

The record shows a 9-1 consensus among the members of the Associates Committee that Ezold's admission to the partnership was "unlikely" because of their overall assessment of her legal

analytical ability. It was followed by the unanimous negative vote of the Executive Committee and the entire partnership. The positive evaluations of some partners concerning Ezold's skills in areas other than legal analysis do not show the reason Wolf advanced for denying partnership to Ezold was incredible and so a pretext for discrimination.

Ezold, unlike the plaintiffs in *Bennun* and *Kunda*, is not able to point to an objectively quantifiable factor by which Wolf compared her qualifications against those of the male associates considered for partnership. Wolf's articulated reason, lack of legal analytic ability to handle complex litigation, like all its other criteria, involves subjective assessment of an associate's manifested behavior and performance.[19]

D.

Here, the district court not only based its finding of pretext on invalid comparisons, but it also ignored evidence Wolf produced to compare Ezold's shortcomings with the strengths of the successful male candidates in the category of legal analytic ability.

Thus, Wolf also argues the district court ignored significant evidence by focusing only on the positive evaluations in Ezold's files and turning a blind eye to the many negative criticisms concerning her analytic ability. *Compare Ezold I*, 751 F. Supp. at 1183 *with* Typescript, *supra* at

19. Among the factors other than legal analytic ability that Wolf considered are "creativity," "negotiating and advocacy," "attitude," "ability under pressure" and "dedication." *See* typescript *supra* at 10 (listing criteria of legal performance and personal characteristics appearing on evaluation form).

14-22. Wolf's attack in this respect is even more serious in its consequence than its attack on the court's use of comparisons between Ezold and the successful male candidates in categories other than legal analytic ability. The court's improper comparison of Ezold and the successful males in categories other than legal analytic ability would merely require a remand for appropriate comparison. If, however, Ezold is unable to show that she compared favorably in the category of legal analytic ability with at least one of the successful male candidates, she will have failed to show that Wolf did not pass her over for the legitimate reason it asserted. If she fails in that respect, she loses the benefit of the inference of unlawful discrimination that arises when the employer's legitimate articulated reason is shown not to be the real reason for the employer's discriminatory action. Absent that inference, Ezold cannot prevail on her *McDonnell Douglas/Burdine* theory unless she has produced direct evidence independently sufficient to show discriminatory animus, an issue we consider in Part IX, *infra*. *See Burdine*, 450 U.S. at 254-56. *Compare McDonnell Douglas*, 411 U.S. at 801 ("The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and . . . neutral employment and personnel decisions.") *with Burdine*, 450 U.S. at 259 ("Title VII, however, does not demand that an employer give preferential treatment to minorities or women.") (citing 42 U.S.C.A. § 2000e-2(j)).

We are not unmindful of the difficult task a plaintiff faces in proving discrimination in the application of subjective factors. It arises from an

inherent tension between the goal of all discrimination law and our society's commitment to free decisionmaking by the private sector in economic affairs.

The fact that Wolf's articulated reason for rejecting Ezold, lack of legal analytical ability, involves subjective and not objective factors subject to easy measurement does not, therefore, insulate the partnership decision from all review. When an employer relies on its subjective evaluation of the plaintiff's qualifications as the reason for denying promotion, the plaintiff can prove the articulated reason is unworthy of credence by presenting persuasive comparative evidence that non-members of the protected class were evaluated more favorably, *i.e.*, their deficiencies in the same qualification category as the plaintiff's were overlooked for no apparent reason when they were promoted to partner.[20]

A plaintiff does not establish pretext, however, by pointing to criticisms of members of the non-protected class, or commendation of the plaintiff, in categories the defendant says it did not rely upon in denying promotion to a member of the protected class. Such comments may raise doubts about the fairness of the employer's decision. "The fact that a court may think that the employer misjudged the qualifications of the applicant does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for

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20. As discussed *infra*, the plaintiff can also prove that despite the employer's articulated reason, a discriminatory reason "more likely" motivated the employer's decision. *Burdine*, 450 U.S. at 256.

discrimination." *Burdine*, 450 U.S. at 259; *see also Billet*, 940 F.2d at 825. It does not, however, always prove the employer's reason is "unworthy of credence" in and of itself. *See McDonnell Douglas*, 411 U.S. at 804-05. Evidence establishing such incredibility must show that the standard or criterion the employer relied on was "obviously weak or implausible."[21] *Villanueva v. Wellesley College*, 930 F.2d 124, 131 (1st Cir.), *cert. denied*, 112 S. Ct. 181 (1991). Ezold's evidence does not make this showing.

On this issue of sufficiency, it is necessary to consider preliminarily Ezold's contention that the district court correctly refused to credit many of the negative evaluations of her analytical ability because they were by persons for whom she had never done "substantial" work. Since the district court relied on favorable evaluations of Ezold from partners who likewise had insubstantial contact with her, Ezold's argument would improperly allow the district court to apply a double standard in the use of positive, as opposed to negative, comments. For example, the district court relied on a favorable evaluation of Ezold by Bradley although he had never worked directly with her on a case. Similarly, an evaluation Robert Wolf, a retired partner in the corporate department, had written before the district court's dismissal of the complaint Ezold filed in that case, expressed his satisfaction with her handling of the client in the Union League matter. *See Firestone & Parson, Inc. v. Union League*, 672 F. Supp. 819 (E.D. Pa. 1987),

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21. The defendant is not required to prove that those promoted are "better qualified" than the plaintiff. *See Burdine*, 450 U.S. at 258.

aff'd mem., 833 F.2d 304 (3d Cir. 1987). In fact, seventeen of the twenty-one partners who viewed Ezold's admission "with favor" or "with enthusiasm" had only "slight contact" or "no contact" with her during the evaluation period and based their vote solely on reputation or minimal contact.

The district court's failure to consider the negative evaluations of Ezold's legal analytic ability because the partners making them had little contact with Ezold cannot be excused in the face of the credence the district court gave to positive comments about Ezold's ability from those who likewise had little or no contact with her. While a factfinder can accept some evidence and reject other evidence on the basis of credibility, it should not base its credibility determination on a conflicting double standard.

Moreover, the district court never made a finding that the critical evaluations were themselves incredible or a pretext for discrimination. There is no evidence that Wolf's practice of giving weight to negative votes and comments of partners who had little contact and perhaps knew nothing about an associate beyond the associate's general reputation was not applied equally to female and male associates. *Cf. Hopkins*, 618 F. Supp. at 1116 ("Regardless of its wisdom, the firm's practice of giving 'no' votes [by partners who had only limited contact with the candidate] great weight treated male and female candidates in the same way."). Ezold's preliminary contention that the district court did not have to consider these negative comments lacks merit. We turn therefore to an examination of the evidence comparing Ezold and

the successful male candidates in the category of legal analytic ability.

A sampling of comments from the negative evaluations of Ezold's legal analytic ability reveals the extent to which the district court's refusal to consider them flawed its analysis. For example, Fiebach was one of those with negative comments about Ezold's legal analytic ability. He consistently rated Ezold's analytical skills as "marginal" long before a 1988 disagreement in the Carpenter matter.[22] *See* App. at 3190-91, 3025. Fiebach had experienced "substantial" contact with Ezold during her final two years as an associate. He recommended Ezold for partnership, with professed "negative feelings." *See* App. at 3544-47.

Fiebach was not alone in his negative comments about Ezold's legal analytic ability. Arbittier also strongly and consistently criticized Ezold in the category of legal analysis.[23] Arbittier had opposed

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22. Ezold argues the district court appropriately declined to consider Fiebach's objections because they were gender-based. Ezold refers to an April 1988 disagreement over case strategy in the Carpenter case. The district court made a general finding that Ezold

> was criticized for being "very demanding" and was expected by some members of the Firm to be nonassertive and acquiescent to the predominantly male partnership. Her failure to accept this role was a factor which resulted in her not being promoted to partner.

Ezold I, 751 F. Supp. at 1189 (FOF 132). This general finding does not permit the court to ignore Fiebach's assessment. It does, however, illustrate again that the court did not consider the whole record relating to Wolf's articulated reason for denying Ezold a partnership position.

23. The record shows that Arbittier was a tough critic of many

hiring Ezold in the first instance because he did not think she had the academic credentials to make it at the firm. *See* App. at 3414 ("[p]oor academic record—well below our standards"). In a 1984 evaluation Arbittier wrote "she is doing much better than I thought she would . . . ."[24] App. at 3397. Ezold later did work for Arbittier, and his contemporaneous evaluations indicate he was not impressed by her performance. *See id.* at 1488-89, 3380 (her brief was "stilted and unimaginative"; "she failed to cite me to a clause in the agreement that was highly relevant"; "she missed [the main issue] completely"). He ultimately recommended Ezold's admission to the partnership "with mixed emotions."

Even Ezold's strongest supporters acknowledged the shortcomings in her legal analytical ability. *See, e.g.*, App. at 3894 (Boote) ("I would not want her in charge of a large legally complex case, the traditional measure of a Wolf, Block partner."); *id.* at 3878 (Kurland) ("Nancy is an exceptionally good courtroom lawyer . . . except there seems to be serious question as to whether she has the legal ability to take on large matters and handle them on her own."); *id.* at 3512 (Schwartz) ("Nancy is adequate in [legal analysis], -but is not a legal scholar."); *id.* at 3956 (Davis) ("She remains a little weak in her initial analysis of complex legal issues."). These contemporaneous criticisms support Wolf's contention that the final consensus

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associates, male and female, when he felt they did not measure up to Wolf's standards on analytic ability.

24. The most damning motive that these comments reveal is lack of confidence based on academic credentials. This is a far cry from sex discrimination.

among its partners that Ezold did not, in the perception of the firm, possess the legal analytical capacity requisite to becoming a partner, and not her sex, was the reason for denying her a partnership position.

VIII.

The district court's error in failing to consider the many negative evaluations of Ezold's legal analytic ability, like its error in comparing Ezold's strengths in other categories with the successful male candidates, is not dispositive of Wolf's argument that Ezold failed to produce evidence sufficient to show she was manifestly as good as the least capable of the favored males. The failure to consider these negative comments would not be fatal to Ezold's case if there were evidence in the record that could rationally support a finding of unequal treatment by Wolf in applying its articulated reason for the screening of candidates for partnership. Thus, it remains necessary for us to examine the record in that respect.

We note at once that it shows the evaluation process at Wolf is demanding. *Cf. Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 991-92 (1988) ("[o]pinions often differ when managers and supervisors are evaluated, and the same can be said for many jobs that involve . . . complex and subtle tasks like the provision of professional services . . . ."); *Zahorik v. Cornell Univ.*, 729 F.2d 85, 93 (2d Cir. 1984) ("Where a broad spectrum of views is sought . . . a file composed of irreconcilable evaluations is not unusual. . . . [T]enure files typically contain positive as well as negative evaluations, often in extravagant terms, sufficient to support either a grant or denial of

tenure."). The firm may have been wrong in its perception of Ezold's legal analytic ability and, if so, its decision to pass over Ezold would be unfair, but that is not for us to judge. Absent a showing that Wolf's articulated reason of lack of ability in legal analysis was used as a tool to discriminate on the basis of sex, Ezold cannot prevail. *See Billet*, 940 F.2d at 828; *Hopkins*, 618 F. Supp. at 1116; *cf. Hishon v. King & Spalding*, 467 U.S. 69, 81 (1984) (Powell, J., concurring) ("The qualities of mind, capacity to reason logically . . . and the like are unrelated to race or sex.").

A.

Always having in mind that the issue before us is whether the firm passed over Ezold because she is a woman, we begin our specific comparative analysis with male Associate A.

Associate A worked in Wolf's litigation department. He was recommended for partnership by the Associates Committee in the fall of 1988. He is closest to Ezold in the category of legal analysis, and, like her, received some negative evaluations over the years.[25] In its findings concerning A's evaluations, however, the district court failed to point out that no partner actually rated A lower than Ezold in the criterion of legal analysis. No partner had expressed serious problems with A's analytical ability as of 1988, the year he was up for partnership, as in Ezold's case. In fact, no partner gave A a grade below acceptable/marginal in the category of legal analysis during his final evaluation period.

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25. The district court's findings recited these comments. *See* FOF 76-86.

Associate A received at least one and sometimes several marks of "distinguished" in this category during each evaluation period from April 1984 through 1988. Gregory Magarity, Ezold's most ardent advocate, rated A as "distinguished" in legal analysis in 1987 and 1988, higher than the grade of "good" he gave Ezold in those years. He wrote:

> [Associate A] did a magnificent job in the preparation and trial of [a case] in Indianapolis, Indiana. His written product was excellent; his support and legal analysis were likewise excellent . . . . You can assign [Associate A] to any of my cases.

App. at 5127. Barry Schwartz, David Doret, Donald Joseph and Donald Bean also consistently rated A as distinguished. Boote, a supporter of Ezold, also rated A higher than Ezold in this category. The record is replete with positive comments from many partners about Associate A that the district court did not refer to. In 1987 and 1988, not one partner ever gave Ezold an unqualified rating of "distinguished" in the category of legal analysis.[26]

Although Fiebach rated A as just "acceptable" in legal analysis in 1988 (App. at 6385), the district

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26. Ezold did receive one "distinguished/good" from Stephen Goodman, who had substantial contact with her, in May 1987. In addition, she received a "distinguished" in legal analysis in 1983 and 1984 from Bean and in 1985 from Magarity. Wolf contended that one of the factors taken into account by the Associates Committee was whether a partner had a reputation as an especially hard or easy grader. There is strong evidence supporting Wolf's contention that Magarity was an "easy grader". The record is full of glowing memos that he wrote on behalf of male associates, including Associates A and B. *See* App. at 5126, 5128.

court incorrectly compared his single rating to Ezold's "bottom line" rating of "good" which was prepared not by Fiebach, but by Associates Committee member Arthur Block based on Block's own shorthand summary of a large number of individual evaluations of Ezold's analytic ability.[27] *See Ezold I*, 751 F. Supp. at 1184 (FOF 77). That same year Fiebach gave Ezold a rating of "marginal," lower than the acceptable rating he gave A in that criterion.

Strogatz had also made a critical evaluation of A in 1987, the year prior to his admission to the partnership, but Strogatz viewed A's admission to the partnership "with favor" in 1988. He wrote that "[A] is over the line," App. at 4354, and graded him as "good/acceptable" in the category of legal skills. Strogatz did not grade Ezold in this category in 1987 or 1988 because of no contact with her other than administratively. He did state, however, that "[m]y impression from others is that her legal skills are at best average and more probably marginal." App. at 3975.

Finally, in 1988, eight partners viewed A's admission to the partnership "with enthusiasm," one "with enthusiasm/favor," thirty-two "with favor," six "with mixed emotions," one "with negative feelings" and the rest had no opinion. Davis was the only partner in the firm to vote for A's admission to the partnership with a negative view. He gave A the same grade as Ezold, however, in the category of legal analysis. In 1988, seven partners viewed Ezold's admission "with

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27. The 1988 bottom line memos on Ezold and A were both prepared by Block. His summary of both of their legal analysis grades was "good."

enthusiasm," fourteen "with favor," six "with mixed emotions," four "with negative feelings" and one "with mixed emotions/negative feelings." A's analytical skills, while criticized by various partners, were never as consistently questioned as Ezold's. The criticisms of A, found among the comments of the partners evaluating Ezold and A, do not support a finding that Wolf's legitimate non-discriminatory reason for refusing a partnership position to Ezold was incredible. In a comparison of subjective factors such as legal ability, it must be obvious or manifest that the subjective standard was unequally applied before a court can find pretext. *See* typescript *supra* at 37-39; *Villanueva*, 930 F.2d at 131. Unequal application of the criterion of legal ability is not manifest between Ezold and Associate A on this record.[28] It does not contain evidence sufficient to show that Ezold was held up to a higher standard than Associate A because she was a woman.

Ezold's ability in legal analysis suffers even more in the partners' eyes when compared with the individual evaluations of the other successful male candidates. All of the other males that Wolf accepted for partnership in 1988 received many

28. The record also shows that A had stronger support from the partners within the litigation department than Ezold did. In 1988, of the twenty-eight partners in the litigation department, thirteen partners viewed A's admission "with favor" and three "with enthusiasm"; only two partners had mixed emotions and only one viewed his admission negatively. Ezold, on the other hand, had much less support from the litigation department partners. Only five partners viewed Ezold's admission "with favor" and only three "with enthusiasm"; four partners had mixed emotions and three viewed her admission negatively.

scores of distinguished in the category of legal analysis, and none of them ever received a grade of marginal in this category during his final evaluation period prior to admission to the partnership. We summarize them as follows.[29]

The Associates Committee recommended Male Associate B, an associate in the litigation department, for partnership in July 1989. The critical comments upon which the district court relied with respect to Associate B have nothing to do with B's legal analytical skills but focus instead upon his work habits. B's legal analysis, on the other hand, was often rated as distinguished. *See, e.g.*, App. at 4724 (Poul) ("[H]e does a remarkable job. I expect him to take over the client some day."); *id.* at 4249-51, 4268, 4280. In his last evaluation as a senior associate, six partners rated B as "distinguished" in legal analysis, and not one partner rated him below "acceptable" in this category. Davis and Magarity, Ezold's strongest supporters, graded B higher than Ezold in the category of legal analysis, recognizing his ability as "distinguished." Davis wrote on B's final evaluation that "he has produced elegantly written legal work." App. at 4281. Several partners, even those criticizing B's work habits, characterized him as "very bright." Not one partner viewed B's admission to the partnership with negative feelings.

Associate C, an associate in the real estate department, was recommended by the Associates Committee in 1987 and became a partner in

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29. The district court's findings concerning the evaluations of the other associates with whom it compared Ezold are found in FOF 87-118.

February 1988. With respect to Associate C, the district court made one finding:

> 94. . . . In the 1987 Associates Committee bottom line memo, he received an overall grade of "G," the same as that which Ms. Ezold had received. The summary of evaluations used by the Associates Committee noted that Henry Miller, a partner in the Real Estate Department, had changed Associate C's legal analysis score to ["acceptable"] and suggested that an "adequate [score] may well be sufficient in his mind for regular partnership."

Ezold I, 751 F. Supp. at 1186.

Contrary to this single limited finding by the district court, C's legal analysis was uniformly rated as "good" or "distinguished." The district court ignored the consensus in C's department that he had a high level of legal analytical ability. *See* App. at 4542; *id.* at 4532 (Weintraub) ("Based on his ability to analyze a legal problem, I could feel comfortable in turning over my best client to him for a significant matter.") In citing Miller's grade of "acceptable" in 1987, the district court fails to point out Miller's comments that any problems with B were based on earlier work and that he had improved from that time. Twelve partners viewed C's admission "with enthusiasm," twenty-six "with favor," eight "with mixed emotions" and one "with negative feelings."

Associate D, an associate in the corporate department, was recommended for partner by the Associates Committee in 1988. In addition to other comments unrelated to D's legal analytical ability, the district court relied on the fact that in 1988 three partners said D needed help with his writing

skills. *Ezold I*, 751 F. Supp. at 1186 (FOF 96). The district court failed to note that the partners who said D needed help with writing did so on the basis that English is not D's native language, as he was born and raised in a foreign country. One of the partners criticizing D's writing ability also wrote: "I'd want a close look at his drafting skills—and perhaps we should make a special effort to cultivate them—in view of the language issue." App. at 4460. Very few partners ever questioned D's legal analytical ability and he received several marks of "distinguished" during his evaluations from 1986-88. The following comments from D's file are typical: "Can handle very confusing complex structural and strategic issues. . . . Is a superb strategist on corporate acquisition matters." *Id.* at 4503; "[D] is unusually smart and has an instinctive grasp of business. I believe he is a star." *Id.* at 4481. Eight partners voted for his admission "with enthusiasm," twenty-seven "with favor," twelve "with mixed emotions," one "with favor/mixed emotions" and one "with negative feelings."

Associate E, an associate in the estates department, was admitted to the partnership in 1987. The district court made one finding concerning Associate E:

> 101. Mr. Strogatz stated that Associate E was not a star and that an associate did not need to be a star to be a partner. He also wrote that he thought of Associate E "as a guy just to do work."

Ezold I, 751 F. Supp. at 1186. Strogatz made this comment based on "no contact" with E. *See id.* Strogatz wrote: "Although not a star, [E] meets our

standards." App. at 4438. The district court points to no criticism of E's legal analysis because there is none in the record and, in fact, E's ability was often rated as distinguished. *See, e.g.*, App. at 4417 (Glyn) ("His analytic abilities are exceptional."); *id.* at 4414 (Kamens ("[E] exhibits a willingness to understand certain legal problems and analyzes them quite well."). The district court's reliance on Strogatz's evaluation in finding pretext further demonstrates the inconsistency with which it compared evaluations in this case, relying only on positive evaluations by partners Ezold had done "substantial" work for, while relying on negative evaluations of male associates based on no contact.

The following findings of the district court concerning Associate F, an associate in the corporate department, related to his legal analytical ability:

> 103. The grid on Associate F's bottom line memo in 1988, the year before his consideration for partnership, reflected a composite grade of "G-" for legal analysis.
>
> . . .
>
> 107. The prior year Donald Joseph, a partner in the Litigation Department, had rated Associate F's legal skills as acceptable, noting "a shoddiness in clear thinking or maybe lack of full experience."
>
> 108. At the same time, Michael Temin, a partner in the Corporate Department, recommended that Associate F receive help in his writing and drafting skills.
>
> . . .

110. In 1986, William Rosoff evaluated Associate F:

> [H]e is sometimes too fast or flip or not attentive enough. In one matter, he failed to collect on a letter of credit on the grounds that he supposed Al Braslow would handle that part of the matter, when it was an inappropriate assumption to make especially without talking to Al. In another matter, the time for answering a complaint expired. While he might have thought someone else was seeing to it, he should have double checked.

Ezold I, 751 F. Supp. at 1186-87.

In fact, Joseph's full comment about "a shoddiness in clear thinking" stated:

> Acceptable—I have used . . . [acceptable] in the old [Wolf, Block] terms; a good lawyer, practical and valuable. I can't describe precisely my hesitancy—perhaps a shoddiness in clear thinking or maybe lack of full experience. . . .

App. at 4606. In F's final evaluation period, Joseph recommended F's admission "with favor." *Id.* at 4611. While Temin wrote that F needed help with writing skills in 1988, he gave him a grade of "good" in legal and professional skills. With respect to Rosoff's 1986 criticism, the district court omitted the following statement by Rosoff in the same evaluation: "[F] seems to be fine substantively. . . . I don't cite these as experiences which mean he cannot make the grade here, but he does have to make a more careful and expansive view of his role and responsibilities." *Id.* at 4602. Associate F's legal analytical ability was never called into

question. In addition, F received a "distinguished," numerous "goods," and no "marginals" on his final review. Five partners viewed his admission to the partnership "with enthusiasm," twenty-two "with favor," four "with mixed emotions" and three "with negative feelings." While the number of negative votes is close to the four Ezold received, the record shows that F had greater overall support from the partners in his department than Ezold did in hers.[30]

The district court cited the following comments regarding the legal analytical ability of Associate G, an associate in the corporate department admitted to the partnership in February 1988:

> 112. In the bottom line memorandum on Associate G for 1987, the year before he became partner in the Corporate Department, his grid reflected no composite score higher than "G." In four of the legal skills, including legal research and promptness, Associate G was rated only "acceptable."
>
> 113. In his 1987 evaluation Associate G was rated "acceptable" in legal analysis by Alan Molod, a partner in the Corporate Department. Mr. Molod added that Associate G was "Not a Star" and was "Sloppy at times and [showed] occasional lapses in judgment."

Ezold I, 751 F. Supp. at 1187.

The district court did not credit or consider the many favorable evaluations of G, such as, "[G] is one of the brightest lawyers in our firm." App. at

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30. Of the twenty-eight partners in the corporate department, nine partners viewed F's admission "with favor," two "with enthusiasm," and one negatively.

4676. While Molod rated G as only acceptable in legal analysis in 1987, this score should be viewed against the many "good" and "distinguished" grades he received in this category. Molod's full comments stated: "Good solid lawyer. Not a star. Very hard worker. Sloppy at times and occasional lapses in judgment." *Id.* at 4677. Despite rating G as only "acceptable" in legal analysis in 1987, Molod recommended G's admission to the partnership "with favor." Overall, thirteen partners viewed G's admission to the partnership "with enthusiasm," thirty "with favor," six "with mixed emotions" and two "with negative feelings."

The district court relied on one partner's criticisms of Associate H in concluding that Wolf applied its standards in a more severe fashion to Ezold. It found:

> 116. Mr. Arbittier wrote in his 1987 evaluation of Associate H:
>
> > [Associate H] has really let me down in his handling of a case for General Electric Pension Trust. He missed the crux of the case in the beginning and dragged his feet terribly in getting it back on track. . . . [Associate H] works very hard, but hard work alone is not enough. I have my doubts that he will ever be anything but a helper who does what he is told adequately but with no spark.
>
> Mr. Arbittier wrote that Associate H was trying "to change my view of him and I am giving him a second chance. He [has] brains. Maybe he can change." Mr. Arbittier also called Associate H "phlegmatic, diffident, nonassertive and

> unimaginative," and in 1988 wrote that he was "[not] real strong in legal analysis or in focusing on the key issues (dividing the wheat from the chaff)."
>
> 117. In 1989, Mr. Arbittier concluded that Associate H was a "nice guy" who had made improvement; he supported Associate H for partnership. Mr. Arbittier explained Associate H's "redemption"; Associate H told Mr. Arbittier how he had been overworked.

Ezold I, 751 F. Supp. at 1187.

While the district court credited Arbittier's criticism of H, it chose to ignore Arbittier's continuing criticism of Ezold on the same grounds between 1984 and 1988. *See* typescript *supra* at 14-15, 20. The district court also ignored the fact that in H's final two evaluations, Arbittier viewed his admission to the partnership with favor and wrote the following comments: "[s]ignificant improvement"; "A good lawyer. . . . In the past I had some problems with [H]. He seems to have overcome them. . . ." App. at 4845, 4858. This change in viewpoint was based on H's handling of a specific case for Arbittier. Goldberger specifically wrote in his evaluation of H that Arbittier's critical evaluation was "aberrational . . . [H] is a talented, hard-working lawyer who deserves to make it." *Id.* at 4828. Moreover, the district court failed to acknowledge H's grades of "distinguished" in legal analysis throughout his tenure at the firm. Twelve partners viewed his admission to the partnership "with enthusiasm," seventeen "with favor," one "with mixed emotions" and zero "with negative feelings."

Finally, we note that three of the four partners who expressed "negative feelings" towards Ezold's candidacy were members of her own department, while none of the eight male associates was viewed with "negative feelings" by more than one member of their department.

The district court's finding that Wolf applied its partnership standards in a more "severe" fashion to female associates is clearly erroneous. The comparative evidence of more favorable treatment for male employees contained in this record does not support that finding. *See Bellissimo*, 764 F.2d at 180 (holding pretext "clearly erroneous because [plaintiff] failed to make any showing of disparate treatment and because [defendant] proved that male attorneys were treated the same as she in the disputed areas."). Our review of the entire evaluation files of the eight male associates discloses that, unlike Ezold, whose staunchest supporters persistently expressed doubts about her ability to meet the firm's criterion of legal analysis, Associates A to H faced no comparable degree of criticism about their legal analytical skills. The snippets of comments critical of these male associates culled from dozens of evaluation forms do not show that Wolf's articulated reason for declining to recommend Ezold for partnership was "obviously weak or implausible" or that the standards were "manifestly unequally applied." *Villanueva*, 930 F.2d at 131 (citations omitted).

B.

Despite Wolf's request, the district court failed to make findings concerning other male associates who, like Ezold, were passed over for partnership.

The evidence concerning their evaluations adds support to our conclusion that the district court's finding that Wolf's asserted legitimate reason for denying Ezold a partnership position was a sham cannot be supported on a theory of discriminatory application.

Male Associates 1 and 2, who were comparable to Ezold in the category of legal analysis, were also rejected for regular partnership. Again, we recognize that the district court, as factfinder, "can accept some parts of a party's evidence and reject others." *Bennun*, 941 F.2d at 179. But when the evidence sheds light on whether the employer treated similarly situated males and females alike, it should not be ignored. *See Bellissimo*, 764 F.2d at 181 (comparison of whether male attorneys treated same as discharged female attorney in disputed categories).

Male Associates 1 and 2 were highly rated by a number of partners, but, as with Ezold, the Associates Committee determined their ability in legal analysis fell below the firm's standards. The Associates Committee expressed its views on Male Associates 1 and 2 in a letter to the Executive Committee stating that, although they were "valuable associates," they nevertheless fell below the firm's "historically accepted standards for admission to the partnership." App. at 2586. The partners' comments about Male Associates 1 and 2 were very similar to those criticizing Ezold. This is illustrated by the following sampling of comments about Male Associate 1: "[He] has good talents although he is not as capable in legal analysis as others," *id.* at 4632 (Brantz); "[His] best skills are in client relations and desire to please,

rather than legal analysis or intellectual genius," *id.* at 4630 (Schneider); "[H]e has great difficulty analyzing and drafting complex business transactions," *id.* at 4642 (Wiener); "[There are] questions about his intellectual strength, his ability to manage complex transactions and his level of attention to detail," *id.* at 5044 (Baer). The partners' comments with regard to Male Associate 2 are also similar to those the partners made about Ezold: "[H]e lacks the minimum level of analytic ability which is required to succeed at WB," *id.* at 4696 (Chanin); "[His legal analysis is] just fair. Came up with little in the way of new ideas. . . . Seemed to miss key points at times," *id.* at 4695 (Arbittier); "[Legal analysis is] [n]ot penetrating or focused. I do not feel comfortable relying on his legal judgment," *id.* at 4697 (Arbittier); "[H]e just doesn't have the high level of intelligence we need to handle complex legal questions," *id.* at 4696 (Arbittier); "[He] is an enigma to me. His writing ability is substandard, and I have no confidence in his analytic skill. On the other hand, my client[] likes him very much," *id.* at 4725 (Brantz).

If the district court had employed the appropriate comparative analysis by focusing on whether Wolf's articulated reason of legal analysis was a pretext, it should have reached a different result. Our review of the whole record leaves us with a "definite and firm conviction that a mistake has been committed" by the district court in its comparative analysis. *United States Gypsum Co.*, 333 U.S. at 395. The record does not show that Wolf applied its partnership admission standards unequally to male and female associates, nor that diminished ability in the area of legal analysis was

an improper reason for denying admission.[31] We sympathize with Ezold's situation and the long hours and efforts she put toward her partnership goal. On the record before us, however, we cannot affirm the district court's finding that Wolf's asserted reason for denying Ezold's admission to the partnership was unworthy of credence based on her theory that its standard of legal analytic ability was applied to her in an unlawfully discriminatory manner.

Because the evaluation files contain insufficient evidence to show that Ezold was evaluated more severely than the male associates, Ezold has not shown that Wolf's proffered reason for failing to promote her was "unworthy of credence." We therefore hold that the district court's ultimate finding of pretext cannot be sustained on this basis.

IX.

We must, however, still consider certain additional evidence which Ezold says directly establishes that Wolf's articulated reason was a pretext by showing that a discriminatory reason more likely motivated its decision not to admit her to the partnership.

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31. Wolf contends additionally that the district court erred in its post-trial decision to exclude from evidence the evaluation files of three successful female partnership.

Assuming, without deciding, that these files were relevant, we note the district court did not exclude them on grounds of relevancy. Rather, when they were offered on redirect, it ruled they were "beyond the scope" that could have been anticipated on direct examination and were not proper redirect. In any event, in view of our disposition we need not resolve this issue.

As stated at the outset of our pretext analysis, sufficiently strong evidence of an employer's past treatment of a plaintiff may prove pretext. *See Patterson*, 491 U.S. at 188; *McDonnell Douglas*, 411 U.S. at 804. An employer's general policy and practice with regard to minority employment may also establish pretext. *McDonnell Douglas*, 411 U.S. at 804-05. The district court held that four instances of conduct "supported" the finding of pretext that it otherwise based on its comparison of Ezold with Associates A-H. The four instances of conduct by Wolf that the district court held supported its finding of pretext were: (1) Ezold was evaluated negatively for being too involved with women's issues in the firm; (2) a male associate's sexual harassment of female employees at the firm was seen as "insignificant"; (3) Ezold was evaluated negatively for being very demanding while male associates were evaluated negatively for lacking assertiveness; and (4) Ezold "was the target of several comments demonstrating [Wolf's] differential treatment of her because she is a woman." *Ezold I*, 751 F. Supp. at 1192 (COL 12). They are discussed in Part IX C. *infra*. In addition, it made findings of fact concerning Wolf's assignment process that Ezold claims support its finding of pretext. We discuss that contention in Part IX A. Ezold's contention that the ratio of male to female partners at Wolf shows a pattern of illegal discrimination is the subject of Part IX B. Finally, Ezold points to other evidence in the record, upon which the district court made no findings, as evidence that shows Wolf's asserted reason for passing her over was pretextual. She contends that this evidence, considered as a whole, would entitle the district court to find that

Wolf "more likely" denied her admission to the partnership because of her sex than because of Wolf's asserted legitimate non-discriminatory reason. *See Burdine*, 450 U.S. at 256. That evidence is the subject of discussion in Part IX D.

In order to succeed on this theory, Ezold must show that it is more likely that the firm denied her a partnership position because of her sex than because of its perceptions of her legal analytic ability. With this causal requirement in mind, we will analyze each of the incidents or practices at Wolf which Ezold alleges shows directly that Wolf passed her over because she is a woman rather than because of any deficiency Wolf might have perceived in her legal ability.

A.

Ezold contends illegal discriminatory treatment based on sex deprived her of equal opportunities to work on significant cases or with a wide variety of partners and that this unequal treatment is evidence of gender discrimination. From 1983 to 1987, Kurland was responsible for the assignment of work to associates in the litigation department. He often delegated this responsibility to Arbittier. Though Ezold acknowledges that many partners bypassed the formal assignment procedure and directly assigned matters to associates, the district court found that Arbittier assigned Ezold to actions that were "small" by Wolf standards. *Ezold I*, 751 F. Supp. at 1178 (FOF 24).[32] Ezold complained to Kurland and others about the

32. The district court's complete findings concerning Wolf's assignment process as it related to Ezold are found in FOF 21-40.

quality of her assignments and that she had opportunities to work only with a limited number of partners.

This Court has recognized that when an employer discriminatorily denies training and support, the employer may not then disfavor the plaintiff because her performance is affected by the lack of opportunity. *Jackson v. University of Pittsburgh*, 826 F.2d 230, 235 (3d Cir. 1987), *cert. denied*, 484 U.S. 1020 (1988); *EEOC v. Hay Assocs.*, 545 F. Supp. 1064, 1072 (E.D. Pa. 1982). Even if we assume that Ezold received "small" cases at the beginning of her tenure at Wolf, however, there is no evidence this was the result of sex discrimination. Her evaluations indicate, rather, that it may have been her academic credentials that contributed to her receipt of less complex assignments. For example, Davis stated that "[t]he Home Unity case was the first really fair test for Nancy. I believe that her background relegated her to . . . matters (where she got virtually no testing by Wolf, Block standards) and small matters." App. at 3514. It is undisputed that Arbittier opposed hiring Ezold because of her academic history and lack of law review experience. In one of Ezold's early evaluations, Kurland wrote: "She has not, in my view, been getting sufficiently difficult matters to handle because she is not the Harvard Law Review type. . . . We must make an effort to give her more difficult matters to handle." *Id.* at 3400. He also stated: "I envisioned . . . her when I hired her as a 'good, stand-up, effective courtroom lawyer.'" *Id.* at 3348. In urging the Executive Committee to reconsider Ezold's candidacy Magarity wrote:

> [The] perception [that she is not able to handle complex cases] appears to be a product of how Sy Kurland viewed Nancy's role when she was initially hired. For the first few years Sy would only assign Nancy to non-complex matters, yet, at evaluation time, Sy, and some other partners, would qualify their evaluations by saying that Nancy does not work on complex matters. Nancy was literally trapped in a Catch 22. The Chairman of the Litigation Department would not assign her to complex cases, yet she received negative evaluations for not working on complex matters.

Id. at 5576-77.[33]

While it would be unfortunate if these academic and intellectual biases were perpetuated after the decision was made to hire Ezold, academic or intellectual bias is not evidence of sex discrimination. The district court made no finding that Ezold was given small assignments because of her sex. In fact, its findings contradict unlawful discrimination in that respect. It found:

> She worked for partners in the Litigation Department on criminal matters, insurance cases, general commercial litigation and other areas, and also did work for some partners in other departments. She handled matters at all stages of litigation, and was called upon by partners to go to court on an emergency basis.

Ezold I, 751 F. Supp. at 1178 (FOF 22). At trial Ezold characterized many of the cases she worked

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33. Magarity also testified that he saw nothing in Ezold's evaluations indicating any bias against her because of her gender.

on as "complex" by either her standards or Wolf standards. In advocating Ezold for partner, Magarity stated that "from 1986 through the present, Nancy has worked on numerous significant complex cases." App. at 5577.

The district court found that when Ezold suggested to Schwartz in her early years at Wolf that an unfairness in case assignments may have occurred because she was a woman, Schwartz replied: "Nancy, don't say that around here. They don't want to hear it. Just do your job and do well." *Ezold I*, 751 F. Supp. at 1188 (FOF 127); App. at 657. This statement, made years before the 1988 decision to deny Ezold partnership, does not show that Wolf's evaluation of her legal ability was pretextual. Ezold's testimony that she "didn't know of any other reason" than gender for Wolf's treatment of her in the assignment process adds little.

Ezold also points to a preliminary injunction matter early in her career that was reassigned to a man after she had been the sole volunteer. The district court found that Arbittier reassigned the injunction to a man "without explanation." *See* 751 F. Supp. at 1178 (FOF 29). Arbittier, however, testified that he realized the case needed a more senior associate and so reassigned it. This too occurred early in Ezold's employment at Wolf and there is nothing in the record to show that it had any connection with Ezold's failure to attain partnership. The district court's finding does not support a conclusion that Wolf's reason for denying Ezold admission to the partnership is pretextual.

The district court also found that when Ezold first got to the firm in 1983, she and a male associate not on partnership track were assigned to sort out a large group of minor cases previously handled by an associate who had left the firm. This finding fails to support the district court's ultimate finding of pretext. The assignment was made on an as-needed basis to fill the void created when the associate working on the matters had left. Additionally, the district court failed to recognize that Arbittier gave Ezold full authority to reassign the matters to other male associates and administer the whole affair. The small bankruptcy matters to which the district court refers were later reassigned by Kurland at Ezold's request. Kurland testified that he did this "both to free Nancy up a little and to give some demonstration that we [were] making an effort to change the nature of her assignments." App. at 3375.

Concerns about associates being exposed only to "small" matters were not unique to Ezold. In fact, numerous partners expressed similar concerns about exposure to partners and assignment to complex cases with respect to male Associates A and B. *See* App. at 4920 ("The Department should try to give A some assignments as second man on a large case. . . . If we fail to do this, [A] will continue to slip along operating independently on cases and we will have to confront, too late, the question of whether or not he meets partnership standards."); *id.* at 4324 ("[A] has not been tested on large matters because of early perceptions that he was cavalier."); *id.* at 4928 (B must get broader exposure); *id.* at 4926 ("somehow [B] must get broader exposure—even his Dep't. Chairman knows nothing about him."). Ezold's assignment to

a disproportionate number of small matters may have reflected academic or intellectual bias. Beyond her own perceptions, however, Ezold offered no evidence showing that she was treated differently from male associates in getting assignments or exposure. The findings of the district court concerning Wolf's assignment process are in fact gender-neutral and do not support its ultimate finding of pretext.

With respect to the district court's finding that the firm prevented Ezold from gaining wide exposure to partners, the record shows that sixty-five partners expressed "no opinion" on the admission of Associate B, a litigator, which was more than the fifty-nine "no opinion" votes Ezold received. Fifty-nine partners also expressed "no opinion" on the admission of Associate H.

The district court's finding that Ezold did not work for more than five hundred hours in any year on any one matter, while "virtually all the male associates in the department" worked for six hundred hours on a single matter, is belied by the record. *Ezold I*, 751 F. Supp. at 1178 (FOF 27). The record shows that Ezold billed 701.2 hours on a major litigation matter in 1985 and that a majority of male associates in the litigation department did not bill six hundred hours or more on any single matter.

Finally, the district court found that by allowing partners to bypass the formal assignment system, Kurland and Arbittier "prevented the plaintiff from securing improved assignments . . . [and] impaired her opportunity to be fairly evaluated for partnership." *Ezold I*, 751 F. Supp. at 1179 (FOF 38, 40). The fact that Wolf's formal assignment process was often bypassed does not support the

district court's finding of pretext.[34] Title VII requires employers to avoid certain prohibited types of invidious discrimination, including sex discrimination. It does not require employers to treat all employees fairly, closely monitor their progress and insure them every opportunity for advancement. "[O]ur task is not to assess the overall fairness of [Wolf's] actions." *Logue*, 837 F.2d at 155 n.5. It is a sad fact of life in the working world that employees of ability are sometimes overlooked for promotion. Large law firms are not immune from unfairness in this imperfect world. The law limits its protection against that unfairness to cases of invidious illegal discrimination. This record contains no evidence that Wolf's assignment process was tainted by a discriminatory motive.

B.

Ezold also tries to reinforce her claim of pretext by pointing to the small number of women admitted to the partnership throughout the firm's history. The record shows that in 1989, only five of Wolf's 107 partners were women and there was only one woman among the twenty-eight partners in the litigation department in which Ezold had sought partnership. The district court made no finding based upon these numbers.[35]

Statistical evidence of an employer's pattern and practice with respect to minority employment may

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34. Ezold did not complain when she benefitted from the informal assignment process.

35. The district court failed to do so despite Ezold's proposed finding on the issue.

be relevant to a showing of pretext. *See McDonnell Douglas*, 411 U.S. at 805. Ezold's raw numerical comparisons, however, are not accompanied by any analysis of either the qualified applicant pool or the flow of qualified candidates over a relevant time period. The district court in *Hopkins* recognized the weakness of this type of evidence:

> [Plaintiff's] proof lacked sufficient data on the number of qualified women available for partnership and failed to take into account that the present pool of partners have been selected over a long span of years during which the pool of available qualified women has changed. Women have only recently entered the accounting and related fields in large numbers and there is evidence that many potential women partners were hired away from Price Waterhouse by clients and rival accounting firms.

Hopkins, 618 F. Supp. at 1116; *cf. Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 650-51 (1989) (in disparate impact case, proper comparison is between racial composition of at-issue jobs and racial composition of qualified population in relevant job market).

Because no conclusion can be drawn from Ezold's raw numbers on underrepresentation, they are not probative of Wolf's alleged discriminatory motive. *See Villanueva*, 930 F.2d at 131 (statistics showing small percentage of minority faculty members inadequate absent some other indication of relevance); *Molthan*, 778 F.2d at 963 ("Because the considerations affecting promotion decisions may differ greatly from one department to another, statistical evidence of a general underrepresentation of women in the position of

full professor adds little to a disparate treatment claim"). We, like the district court, do not consider them material to Ezold's Title VII claim.

C.

Finally, the district court held that the four specific instances of conduct mentioned on typescript *supra* at 75 evidenced a discriminatory animus and supported its finding of pretext. *See Ezold I*, 751 F. Supp. at 1192 (COL 12). It did not hold that these instances of conduct provided an independent or alternative basis for its finding, but viewed them only as support therefor.

1.

The first instance of conduct on which the district court relied was that Ezold "was evaluated negatively for being too involved with women's issues . . . specifically her concern about the [firm's] treatment of paralegals," while Fiebach was not reproached for raising the "women's issue" of part-time employment. *Id.* Ezold's perception was that the firm mistreated its paralegals by overworking and underpaying them and that treatment would not have occurred but for the fact that they were predominantly women. The court's finding on this matter refers to a 1986 evaluation submitted by Schwartz, one of Ezold's partnership supporters, in which he wrote: "Judgment is better, although it still can be clouded by over-sensitivity to what she misperceives as 'womens' [sic] issues." App. at 3366. Schwartz testified, however, that he was not criticizing Ezold for raising the issue of the firm's treatment of paralegals, but for her misperception that this was a "women's issue." *Id.* at 1585-86. Moreover, the

fact that Fiebach, a male partner, was not criticized for encouraging discussion of part-time employment is not probative of whether the partnership decision concerning Ezold was gender-based. This evidence is of marginal value in supporting the district court's finding of pretext.

2.

The second instance of conduct on which the district court relied was "the fact that a male associate['s] sexual harassment of female employees at the Firm was seen as insignificant and not worthy of mention to the Associates Committee in its consideration of that male associate for partnership." *Ezold I*, 751 F. Supp. at 1192 (COL 12). While it is undisputed that the male associate, Associate X, engaged in some form of harassment of female employees, the district court's finding about Wolf's attitude towards it is unsupported by the evidence and thus clearly erroneous. The record shows that Strogatz, then Chairman of the Associates Committee, met with Associate X concerning these incidents, and that a memorandum was placed in his personnel file. There was testimony that the incident was reported to the associate's department chairman and to the Associates Committee. The record also indicates that the incident occurred after the Associates Committee decided it was unlikely to recommend Associate X for partnership in any event. There is no evidence Wolf viewed the incident as "insignificant." This incident is not evidence that the firm harbored a discriminatory animus against either women generally or Ezold specifically. It lends no support to the district court's finding of pretext.

3.

The district court found that Ezold was "evaluated negatively for being 'very demanding,' while several male associates who were made partners were evaluated negatively for *lacking* sufficient assertiveness in their demeanors." *Ezold I*, 751 F. Supp. at 1192 (COL 12) (emphasis in original). The criticisms of Ezold's assertiveness related to the way in which she handled administrative matters such as office and secretarial space, and not legal matters. *See* App. at 2206-11 ("Very difficult to deal with on administrative matters. Very demanding."); *see also id.* at 3365, 3389. In particular, David Hofstein's evaluation of Ezold in 1984 stated:

> My one negative experience did not involve legal work. When my group moved to the south end of the 21st floor, Nancy had a fit because she had to move. As I. Strogatz and our [Office Manager] know, Nancy's behavior was inappropriate and I think affected everyone's perception of her. Dealing with administrative matters professionally is almost as important as dealing with legal matters competently, and at least in that instance, Nancy blew it.

App. at 3393.

The district court refers to criticisms of male associates for lacking assertiveness, but in connection with their handling of legal matters. The district court was comparing apples and oranges. The record shows that male associates were also criticized for their improper handling of administrative problems. *See* App. at 3388 ("He has had a series of run ins with administration

. . . ."); *id.* at 5099 (associate not admitted to partnership criticized for "lack of tact, being arrogant or undiplomatic or unconciliatory); *id.* at 4778 ("[h]e is quarrelsome"). The district court also quotes an evaluation of Ezold as a "prima donna" on administrative matters, but leaves out the full context of the statement which compares her to a male associate: "Reminds me of [a male associate]—very demanding, prima donna-ish, not a team player." *Id.* at 3209.[36]

The district court's finding that this evidence supports its conclusion that Ezold was treated differently because of her gender is clearly erroneous. An "unfortunate and destructive conflict of personalities does not establish sexual discrimination." *Bellissimo*, 764 F.2d 175, 182 (3d Cir. 1985). Further, by the time of Ezold's final evaluation in 1988, there was no mention of her attitude on administrative matters. Rosoff testified that in independently reviewing the Associate Committee's decision not to recommend Ezold for partnership, he disregarded the criticisms of her handling of administrative matters from earlier years as "ancient history." App. at 2410. There is

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36. The district court made no finding concerning another incident involving Ezold. In that respect, the record indicates that Ezold was chastised for her handling of a request to reassign a case. Kurland had told Ezold that she should not handle any more small cases so she could free herself up for more substantial matters. He said that if she was assigned small cases she should come to him about reassignment. When Arbittier sent her the file in a simple bankruptcy case she sent it back with a note asking that it be reassigned. The record indicates that Ezold was criticized for just sending the file back with a note instead of talking to someone first. There is, however, no mention of this incident in any of Ezold's evaluations.

again no evidence that this incident played any role in Wolf's decision to deny Ezold's admission to the partnership.

4.

Finally, the district court found that Ezold was the target of several comments demonstrating the firm's differential treatment of women. The district court found the following:

> During the selection process . . . Mr. Kurland told Ms. Ezold that it would not be easy for her at Wolf, Block because she did not fit the Wolf, Block mold since she was a woman, had not attended an Ivy League law school, and had not been on law review. Mr. Kurland and Ms. Ezold stated that at one of the meetings with Ms. Ezold, only Ms. Ezold and he were present.

See Ezold I, 751 F. Supp. at 1177 (FOF 18). Ezold did not raise this reference at a subsequent lunch with associate Liebenberg, a woman, and Schwartz, nor did she express concern over Wolf's treatment of women. Although Kurland denied making the statement, the district court resolved this credibility issue in Ezold's favor and we will not disturb it.

Wolf argues that this comment made in 1983 before Ezold accepted the job is not probative on whether its partnership decision five years later was gender-based. In *Roebuck v. Drexel University*, 852 F.2d at 733, the plaintiff alleged racial discrimination in the denial of tenure and we considered the probative value of evidence of a discriminatory attitude on the part of a key decisionmaker. There, the president of the university exercised a significant influence on the

decisionmakers and had made the final tenure decision. He had also made two statements reflecting racial bias. *Id.* We held, although the "statements standing alone, occurring as they did over five years before the final denial of tenure, could not suffice to uphold a finding [of discrimination], they do add support, in combination with the other evidence, to the ultimate conclusion." *Id.*; *see Jackson v. Harvard Univ.*, 721 F. Supp. 1397, 1431 n.24 (D. Mass. 1989) (alleged derogatory comments made to plaintiff by dean before she began teaching "were made well before the plaintiff's tenure review process began and are manifestly too remote from the tenure decision-making process to have any relevance in this action"), *aff'd*, 900 F.2d 464 (1st Cir.), *cert. denied*, 111 S. Ct. 137 (1990). Here, however, as we have painstakingly pointed out, other evidence of sex discrimination is lacking. In any event, Kurland made this comment before Ezold began her employment at Wolf, five years before the partnership decision. The comment's temporal distance from the decision Ezold says was discriminatory convinces us it is too remote and isolated to show independently that unlawful discrimination, rather than Wolf's asserted reason, more likely caused the firm to deny Ezold the partnership she sought in 1988.

Kurland himself had left the firm in January 1988, before Ezold's 1988 evaluation and before the Associates Committee and the Executive Committee denied her admission to the partnership. Thus, he did not take part in the final decision to deny Ezold's admission to the partnership, although he had consistently supported her candidacy despite his recognition of

other partners' perceptions about her legal analytical ability. *See Ezold I*, 751 F. Supp. at 1182 (FOF 62) ("I think she has proven her case."). Stray remarks by non-decisionmakers or by decisionmakers unrelated to the decision process are rarely given great weight, particularly if they were made temporally remote from the date of decision. *See Hopkins*, 490 U.S. at 277 (O'Connor, J., concurring); *Frieze*, 950 F.2d at 541; *Guthrie v. Tifco Indus.*, 941 F.2d 374, 378-79 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1267 (1992). We decline to depart from this principle in the present case.

D.

In her brief on appeal, Ezold points to several other alleged sexist comments by Kurland to which she testified at trial but upon which the district court made no findings. Thus, the remaining issue on sufficiency is whether all of the sexist comments Ezold attributes to Kurland, taken together, are enough to establish pretext. Ezold testified that at the close of a litigation department dinner, Kurland singled her out for interrogation on the issue of sex discrimination at the firm. Kurland testified that he addressed the topic to the entire group because he was Vice Chancellor of the Philadelphia Bar Association and everyone was discussing the issue at the time. Ezold also testified and Kurland did not deny that Kurland would give her instructions in the hallway to "smile" and crudely ask whether she had any romantic encounters the night before. She also testified that at a litigation associates' breakfast Kurland recounted a judge's comments about a

murder case involving the rape of a corpse. Kurland testified:

> I looked around at the young people and at the time I was in the middle of a murder trial and I thought, my God, my young people here, have such a narrow fragmented aspect of what law is today, interrogatories and depositions in Federal Court, dealing in money matters and they don't really have a comprehension of what happens in law, that we have a whole state court system and criminal system, that they do not even come in contact with and I thought it would be beneficial for them to broaden their horizon to give them some exposure to hear firsthand from me what it was like to be involved in an actual murder trial . . . [and that] the judge was telling me about other cases he had . . . and he told me about this one case and I talked about a case that a man had killed a woman and had sex with her afterwards.

App. at 1756-57.

Ezold additionally testified that Kurland told her not to refer a talented female attorney to the firm for employment because he did not want the problems caused by another female attorney working in the litigation department. Kurland did not recall Ezold talking to him about hiring anyone but denied making the statement about women associates. Finally, Ezold points to an alleged statement by Kurland cautioning female attorneys with children from traveling on business. Kurland denied making this statement and in fact often assigned Liebenberg, a female partner who had small children, to cases requiring extensive travel.

Although the district court made no findings that these statements were actually made or whose version of the facts it believed, we must consider them on the sufficiency issue in the light most favorable to Ezold. In doing so, we recognize that proof of a discriminatory atmosphere may be relevant in proving pretext since such evidence "does tend to add 'color' to the employer's decisionmaking processes and to the influences behind the actions taken with respect to the individual plaintiff." *Conway v. Electro Switch Corp.*, 825 F.2d 593, 597 (1st Cir. 1987). We must therefore decide whether these six alleged comments by Kurland over a period of five years are sufficient to sustain the district court's finding that Wolf's reason for denying Ezold admission to the partnership—her legal analytical ability—was just a pretext to cover up sex discrimination.

In *Lockhart v. Westinghouse Credit Corp.*, we considered the relevance in an age discrimination case of a statement made by a corporate vice-president after the plaintiff's termination. The vice-president stated: "[This company] was a seniority driven company with old management and that's going to change, 'I'm going to change that.'" 879 F.2d at 54. We said:

> When a major company executive speaks, "everybody listens" in the corporate hierarchy, and when an executive's comments prove to be disadvantageous to a company's subsequent litigation posture, it can not compartmentalize this executive as if he had nothing more to do with company policy than the janitor or watchman.

Id. This case is superficially similar to *Lockhart* in that Kurland, as the chairman of the litigation department, was a company executive until he left the firm in 1987. It is distinguishable, however, in several material respects. The other evidence supporting the verdict in favor of the plaintiffs in *Lockhart*, unlike the evidence in the present case, was substantial.[37] In addition, though Kurland was at one time a decisionmaker and eventually supported Ezold's admission to the partnership, he took no part in the final votes or evaluations concerning Ezold because he had by that time left the firm.

Though Kurland's comments, if made, were crude and unprofessional, we do not believe they are sufficient in and of themselves to sustain the district court's judgment in favor of Ezold. They

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37. In *Lockhart*, there was sufficient indirect evidence to support the jury's verdict that age was the determinative factor in Lockhart's discharge. This evidence included: (1) Lockhart had received satisfactory performance evaluations and merit salary increases in each year over his twenty-two year career with the company; (2) he had never received a reprimand or demotion; (3) the alleged reason for his discharge was discrepancies found in an audit of his office, however, he was never given an opportunity to explain these discrepancies prior to his termination; (4) his immediate supervisor testified that he was a good and dependable worker and that the standard company policy was to proceed through a series of reprimands before an employee would be dismissed; (5) the second person responsible for his termination also testified that Lockhart was never insubordinate and never deliberately violated company policy; and (6) there was evidence that the company had decided to undertake a major restructuring which resulted in the consolidation of several locations and the filling of new management positions by much younger and inexperienced individuals. 879 F.2d at 49-50.

may reflect unfavorably on Kurland's personality or his views, but they are not sufficient to show that there was such a pervasive hostility toward women at Wolf sufficient to show that Ezold's partnership decision was more likely the result of discriminatory bias than Wolf's perception[38] of Ezold's legal ability. Ezold has made no claim that Kurland's comments created a hostile working environment. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986).[39] If we were to hold that several stray remarks by a nondecisionmaker over a period of five years, while inappropriate, were sufficient to prove that Wolf's associate evaluation and partnership admission process were so infected with discriminatory bias that such bias more likely motivated Wolf's promotion decision than its articulated legitimate

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38. It bears repeating in this final stage of discussion that Wolf's impression of Ezold's legal analytic ability, informed but at the same time subjective, is the focal point in this case and that Wolf is entitled to form its own subjective judgment on that factor. Wolf is also entitled to be wrong in its judgment so long as it does not base its incorrect decision on unlawful sex discrimination or stereotype.

39. For hostile environment to be actionable under *Meritor*, it must be sufficiently severe or pervasive to alter the conditions of [the plaintiff's] employment and create an abusive working environment." *Id.* at 67 (quotation omitted); *see also Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) ("mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not sufficiently affect conditions of employment to violate Title VII), *cert. denied*, 406 U.S. 957 (1972); *Fox v. Ravinia Club, Inc.*, 761 F. Supp. 797, 801 (N.D. Ga. 1991) (evidence of casual atmosphere and loose conversation that sometimes had sexual connotations or implications insufficient to prove hostile working environment).

reason, we would spill across the limits of Title VII. *See Hopkins*, 109 S. Ct. at 1785 (Title VII strikes a balance between protecting employees from unlawful discrimination and preserving for employers their remaining freedom of choice.).

X.

We have reviewed the evidence carefully and hold that it is insufficient to show pretext. Despite Ezold's disagreement with the firm's evaluations of her abilities, and her perception that she was treated unfairly, there is no evidence of sex discrimination here. The district court's finding that Wolf's legitimate non-discriminatory reason was incredible because Ezold was evaluated more severely than male associates because of her gender, as well as its finding that Wolf's requirement that she possess analytical skills sufficient to handle complex litigation was a pretext for discrimination, are clearly erroneous and find no support in the evidence. Finally, this record also lacks sufficient direct evidence of discriminatory animus to sustain a finding that Wolf more likely had a discriminatory motive in denying Ezold's admission to the partnership.

XI.

Accordingly, we will reverse the judgment of the district court in favor of Ezold and remand for entry of judgment in favor of Wolf.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 91-1741 & 91-1780

Filed February 1, 1993

NANCY O'MARA EZOLD,

Appellant at No. 91-1780,

—v.—

WOLF, BLOCK, SCHORR AND SOLIS-COHEN,

Appellant at No. 91-1741.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Docket No. 90-00002)

Argued: May 21, 1992

PRESENT: HUTCHINSON, COWEN and SEITZ,
Circuit Judges.

ORDER AMENDING SLIP OPINION

IT IS HEREBY ORDERED that the slip opinion in the above case, filed December 30, 1992, be amended as follows:

Page 28, Part IV., line 11—delete "direct evidence" and insert "evidence tied to a discriminatory animus."

Page 29, line 4—delete the word "direct."

Page 93, Part X., line 15—delete the word "direct."

BY THE COURT,

/s/ William D. Hutchinson
Circuit Judge

Dated: February 1, 1993

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 91-1741 & 91-1780

NANCY O'MARA EZOLD,

Appellant at No. 91-1780

—v.—

WOLF, BLOCK, SCHORR AND SOLIS-COHEN,

Appellant at No. 91-1741

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Docket No. 90-00002)

Present: Hutchinson, Cowen and Seitz, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel May 21, 1992.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered July 23, 1991 as amended by the order entered August 5, 1991, be, and the same is hereby reversed and the cause remanded to the said District Court with direction to

enter judgment in favor of Wolf, Block, Schorr and Solis-Cohen. Costs taxed against Ms. Ezold. All of the above in accordance with the opinion of this Court.

ATTEST:
[ILLEGIBLE]
Clerk

Dated: December 30, 1992

Costs taxed in favor of Wolf, Block, Schorr & Solis-Cohen as follows:

Brief	$4,000.44
Appendix	3,555.14
Reply Brief	4,021.64
Amended Appendix	1,133.03
Docketing Fee	100.00
TOTAL	$12,810.25

Certified as a true copy and issued in lieu
of a formal mandate on February 11, 1993

Teste: P. Douglas Sisk

Clerk, United States Court of Appeals
for the Third Circuit

COPY

UNITED STATES DISTRICT COURT

E.D. PENNSYLVANIA

Civ. A. No. 90-0002

Nov. 29, 1990

NANCY O'MARA EZOLD,

—v.—

WOLF, BLOCK, SCHORR AND SOLIS-COHEN,

AMENDED MEMORANDUM

JAMES MCGIRR KELLY, *District Judge*.

The court has now considered the testimony that has been presented in this case and is prepared to make its Findings of Fact and Conclusions of Law and decision.

FINDINGS OF FACT

1. Plaintiff Nancy Ezold has alleged that Wolf, Block, Schorr and Solis-Cohen ("Wolf, Block" or "the Firm") discriminated against her on the basis of her sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, when it decided not to admit her to the partnership. Ms. Ezold also alleged that she was constructively discharged by Wolf, Block on account of her sex by reason of the adverse partnership decision. In addition, Ms. Ezold alleged a claim under the Equal Pay Act, 29 U.S.C. § 206(d), of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq*. The Court

has jurisdiction over this action pursuant to 42 U.S.C. § 2000e–5(f)(3).

2. Prior to trial, with the agreement of the parties, the Court bifurcated the issues of liability and damages.

3. In addition, the Court severed Ms. Ezold's claim under the Equal Pay Act pursuant to Fed.R.Civ.P. 42(b).

4. Ms. Ezold graduated from Villanova Law School in 1980. She graduated 61st out of a class of 194, and was not a member of the Villanova Law Review.

5. Subsequent to her graduation from law school, Ms. Ezold worked at the law firm of Kirschner, Walters & Willig from 1980 to 1981. She was involved primarily in the representation of union members through their union legal services plan in personal matters such as workers' compensation, domestic relations and real estate settlements.

6. From 1981 to July, 1983, Ms. Ezold worked at the law firm of Phillips and Phelan. This firm had two attorneys besides the plaintiff.

7. The defendant Firm hires associates on one of two categories—partnership track and non-partnership track. The plaintiff was hired by the defendant as an associate on a partnership track basis in 1983.

8. The defendant Firm was fully aware of the plaintiff's background when it hired her. There were no objections by anyone on the defendant Firm's hiring committee to the plaintiff's hiring or placing her on a partnership track.

9. Wolf, Block is a law firm based in Philadelphia which, as of 1989, was comprised of 249 attorneys, approximately one-half of whom were partners. Wolf, Block has a number of departments, including real estate, corporate, litigation, taxation, estates and labor. During the time Ms. Ezold worked at Wolf, Block, the Litigation Department grew from 36 to 55 attorneys.

10. Wolf, Block is governed by a 5-member Executive Committee which is responsible for establishing policy for the Firm and for operating the Firm on a day-to-day basis. The Executive Committee's members are elected by the Firm's voting partners.

11. Wolf, Block has a 10-member Associates Committee which includes partners from each of the Firm's departments. The members of the Associates Committee are appointed by the Executive Committee.

12. The Associates Committee is responsible for, *inter alia*, reviewing the performance and evaluations of all of the Firm's associates and making recommendations to the Firm's Executive Committee as to salary and as to which associates should be admitted to the partnership.

13. The Executive Committee reviews the partnership recommendations of the Associates Committee and, in turn, exercises its own discretion in making partnership recommendations to the entire partnership. Only those persons who have been recommended for partnership by the Executive Committee are considered for admission to the partnership by the Firm's voting partners, upon whom rests the sole and ultimate responsibility for determining who is elected to the partnership.

14. The defendant Firm hires many associates immediately after their graduation from law school or completion of a judicial clerkship (referred to as "non-laterals"). Non-laterals are considered for partnership approximately 7½ years after their graduation from law school. Other associates, referred to as "laterals," are hired after they have had experience working at other law firms or in other post-law school employment, and are generally subject to a five-year rule for partnership consideration.

15. Until 1989, certain associates of an experience level to be admitted to a partnership were accorded "special partner" status. Such individuals, in contrast to other partners (referred to as "regular" partners), do not have the right to vote or to receive any equity share in the partnership, are subject to

removal by the Executive Committee, and have benefits which are inferior to those provided to regular partners.

16. In the Spring of 1983, Ms. Ezold applied for employment at Wolf, Block. She met initially with Seymour Kurland, who was then the chairman of the Litigation Department.

17. From 1983 until 1987, Mr. Kurland was the chair of the Litigation Department. Thereafter Alan Davis served as chair of the Litigation Department.

18. In 1983, Ms. Ezold was offered a position as an associate in Wolf, Block's Litigation Department. During the selection process, she had meetings and telephone conversations with Mr. Kurland, who said that her prior work experience helped make her an attractive candidate to do litigation for Wolf, Block. Mr. Kurland told Ms. Ezold that it would not be easy for her at Wolf, Block because she did not fit the Wolf, Block mold since she was a woman, had not attended an Ivy League law school, and had not been on law review. Mr. Kurland and Ms. Ezold stated that at one of the meetings with Ms. Ezold, only Ms. Ezold and he were present.

19. Subsequent to the aforementioned meeting, but before accepting Wolf, Block's offer of employment, Ms. Ezold had lunch with Roberta Liebenberg and Barry Schwartz, who were both members of the Litigation Department. Ms. Ezold admitted she did not mention to them the statement by Mr. Kurland that she would have a difficult time at Wolf, Block because she is a woman, did not ask them any questions about the treatment of women at Wolf, Block, and did not express to them any concern over the Firm's treatment of women.

20. Ms. Ezold began working at Wolf, Block in July, 1983 and was assigned to the Firm's Litigation Department.

21. From 1983 until 1987 Mr. Kurland was responsible for assignment of work to associates in the Litigation Department, a duty he delegated in part to partner Steven Arbittier. Thereafter Mr. Davis assumed primary responsibility for distribution of work to associates in the Department.

22. Ms. Ezold handled various matters for the defendant during her tenure at Wolf, Block. She worked for partners in the Litigation Department on criminal matters, insurance cases, general commercial litigation and other areas, and also did work for some partners in other departments. She handled matters at all stages of litigation, and was called upon by partners to go to court on an emergency basis.

23. Ms. Ezold routinely researched and drafted briefs and pleadings on the matters on which she worked, and during the last two years of her employment at Wolf, Block, supervised junior associates in their preparation of briefs and pleadings.

24. Mr. Arbittier primarily assigned the plaintiff to civil actions that were small cases by Wolf, Block standards, and a variety of criminal matters.

25. For example, in 1983, Mr. Arbittier assigned the plaintiff, together with an associate, Mr. McCullough, responsibility for a large group of minor cases previously handled by Steve Levin, an associate who had worked on such matters and had left the Firm.

26. Thereafter, the plaintiff was given responsibility for ten to fifteen bankruptcy matters involving collections of $400 or less.

27. Ms. Ezold did not work for more than 500 hours on any one matter in any year according to the defendant's computer-maintained time records. In contrast, virtually all the male associates in the department worked on major matters for which they logged at least 600 hours per year.

28. The plaintiff attended regular assignment meetings in the Litigation Department where she had the opportunity to observe the assignments being given to male associates. She learned at such meetings of the informal procedure by which partners spoke directly to certain associates to assign them responsibilities bypassing the formal assignment procedure.

29. During one such meeting, Mr. Arbittier asked for a volunteer to work on a preliminary injunction. Although Ms.

Ezold was the only associate to volunteer, and was initially assigned the case, within an hour Mr. Arbittier, without explanation, had reassigned it to a male associate.

30. The plaintiff complained about the quality of her assignments in civil matters to the Litigation Department partners who assigned cases to associates. The plaintiff also objected to being assigned to work with only a very limited number of partners. Mr. Kurland acknowledged that most of the work opportunities given to the plaintiff were inferior and promised that the problem would be corrected.

31. Part of the negative impression concerning the plaintiff's performance was an impression that she was "not a team player," "institutionally disloyal," and that she "bad-mouthed" the Firm to young associates. The only basis of this criticism advanced by the defendant Firm was the plaintiff's perceived concern about women's issues, such as the Firm's treatment of paralegals, who were virtually all female and the Firm's treatment of part-time attorneys who were all female.

32. The defendant claimed that the plaintiff lacked the intellectual capacity required for partnership at the Firm. In a memorandum regarding the plaintiff dated June 19, 1984, Robert Boote, a Litigation Department partner, wrote on behalf of the Associates Committee:

> The doubts about whether someone has a depth of intellectual ability [are] a classic concern here, which sometimes turns out to be self-perpetuating and fulfilling. Nancy is a confident lawyer who is doing well at her level. She should be given every opportunity to display her intellectual ability.

33. In a 1988 memorandum to the Executive Committee urging Ms. Ezold's admission to partnership, Greg Magarity, a Litigation Department partner who had worked extensively with her, described the "Catch-22" of the perception that Ms. Ezold could not handle complex cases. He wrote:

> [T]he perception that she is not able to grasp complex issues or handle complex cases . . . appears to be a product of how Sy Kurland viewed Nancy's role when she was initially hired. For the first few years Sy would only assign Nancy to non-complex matters, yet, at evaluation time, Sy, and some other partners would qualify their evaluations by saying that Nancy does not work on complex matters. Nancy was literally trapped in a Catch-22. The Chairman of the Litigation Department would not assign her to complex cases, yet she received negative evaluations for not working on complex cases.

34. In a memorandum after his meeting on behalf of the Associates Committee with the plaintiff concerning her evaluation, Mr. Boote wrote in March 1985:

> [Kurland] told her that he was going to see to it that the nature of her assignments was changed so that she would have the opportunity to work with various partners in the Department and so that they would have the opportunity to evaluate her.
>
> * * *
>
> We told her that we did not view it as her fault that she hadn't had the opportunity to demonstrate these [technical] abilities yet, since her work was in large measure a product of the assignments she got.

35. During that meeting, Mr. Boote and Mr. Kurland made a commitment to the plaintiff that she would be assigned an appropriate mix of cases, reporting to a wider group of partners. Ms. Ezold was told that she could not be properly evaluated because she had not had the opportunity to show her skills.

36. Mr. Kurland told Ms. Ezold to let him know if partners tried to assign smaller matters to her directly. Nevertheless, although he was head of the department, Mr. Kurland never assigned her to work on a matter for which he was responsible,

except for one case in which Wolf, Block's participation as one of five firms representing plaintiffs was minimal, and on even that case she had virtually no contact with Mr. Kurland.

37. In a February 1986 memorandum, Mr. Boote noted that Ms. Ezold was handling a number of small matters for Mitchell Panzer. Mr. Boote and Mr. Kurland wanted to reassign these matters "both to free Nancy up a little and to give some demonstration that we are making an effort to change the nature of her assignments." Mr. Boote and Mr. Kurland also told Ms. Ezold that "we would make the effort to try to give her the assignments that will enable her to attempt to build a place for herself."

38. Many partners bypassed both Mr. Kurland and Mr. Arbittier in selecting associates to work on their cases. Mr. Kurland, in permitting this activity to happen, prevented the plaintiff from securing improved assignments.

39. The plaintiff worked with a limited number of partners in and out of the Litigation Department.

40. The plaintiff's lack of opportunity to work with a significant number of partners seriously impaired her opportunity to be fairly evaluated for partnership. As Charles Kopp wrote in late 1985 to Ian Strogatz:

> I have filled out the [evaluation] forms as requested. I have had virtually no contact with any of the senior associates listed. Accordingly, it is difficult to give an opinion as to whether I would feel comfortable in turning over a significant matter for one of my clients or whether I would be in favor of admitting the associate to the firm. When faced with no information, I must answer 'No' to questions like admission to partnership.

41. In Ms. Ezold's 1986 evaluation meeting, Mr. Kurland and Mr. Boote suggested that working in a specialty area would enhance her possibilities for partnership. The partners described continuing and developing her work in white collar

crime as a good niche, but one that should not preclude her from taking on general civil work.

42. In his April, 1986 evaluation of Ms. Ezold, Mr. Boote wrote: "Nancy is good. Very good. Doing certain kinds of work. Let's try to let her make a place for herself."

43. Mr. Kurland also stated that he felt Ms. Ezold could specialize in "trial work" and be valuable to the Firm. If Ms. Ezold specialized in "trial work," and if she became "very valuable to the firm, because it was an area where we really needed somebody and she excelled at that, then that would be a way that she could still perhaps be a partner in the trial department."

44. The plaintiff handled many white collar criminal matters under the supervision of Mr. Magarity, who headed the Firm's white collar crime group.

45. In March, 1987, Mr. Magarity wrote a memorandum thanking Mr. Kurland and Mr. Arbittier for permitting Ms. Ezold to work on his matters. In a 1988 memorandum to the Executive Committee in which he urged Ms. Ezold's admission to partnership, Mr. Ezold wrote:

> Virtually every other criminal defendant these days is a corporation. Nancy has shown considerable ability to handle these type[s] of important complex cases. The demand for capable litigators with Nancy's skills in this area is abundant but the supply is sparse. *I would be more than willing to have Nancy, as a partner, work full-time in this expanding and lucrative area.*

(emphasis added).

46. Each year at Wolf, Block all partners submit written evaluations of all associates. The evaluations are to be completed regardless of the extent of the partner's familiarity with the associate's work.

47. The evaluation forms are explicit in describing information which is sought about the associate. Ten characteristics of legal performance are listed: legal analysis, legal writing and

drafting, research skills, formal speech, informal speech, judgment, creativity, negotiating and advocacy, promptness, and efficiency. Ten personal characteristics are also listed: reliability, taking and managing responsibility, flexibility, growth potential, attitude, client relationship, client servicing and development, ability under pressure, ability to work independently, and dedication.

48. The evaluation forms in use for the years 1987 and 1988 describe for the evaluator what each grade means. The grades are described as follows:

> Distinguished—Outstanding, exceptional; consistently demonstrates extraordinary adeptness and quality; star.
>
> Good—Displays particular merit on a consistent basis; effective work product and performance; able; talented.
>
> Acceptable—Satisfactory; adequate; displays neither particular merit nor any serious defects or omissions; dependable.
>
> Marginal—Inconsistent work product and performance; *sometimes* below the level of what you would expect from Associates who are acceptable at this level.
>
> Unacceptable—Fails to meet minimum standard of quality expected by you of an Associate at this level; *frequently* below the level of what you expect.

49. The instructions on the form direct the evaluator to describe the partner's experience with the associate in the evaluation period. The instructions read as follows:

> In order to obtain a full evaluation of this Associate, you are urged to observe the following principles: Ratings should be applied on the basis of what *you* expect of an Associate at this Associate's level of experience. Each item should be answered by selecting the appropriate objective answer with some brief comment, or "NO." (Not Observed). "NO." should be reserved only for those cases where not even a slight observation has been made, as

there may be small observations by more than one evaluator which will cumulatively indicate a subtle talent, potential or problem that should be brought out to help the Associate in his/her development. **Most valuable to us are your written comments.** *Attach an additional sheet if necessary to express yourself completely.*

(emphasis in original; bold type supplied).

50. Mr. Strogatz described the process by which associates are evaluated for partnership. Senior associates are lateral associates who have completed their second or third years of employment, or non-lateral hires who have completed five years of employment. Senior associates are typically reviewed once a year. Generally, non-senior associates are evaluated twice a year, although that varies somewhat from year to year.

51. The evaluations reflect letter or number grades of an associate's performance in the listed legal and personal skills. Partners are also asked to indicate how they would regard the admission of each senior associate to partnership. The five possible answers for that question are: "with enthusiasm," "with favor," "with mixed emotions," "with negative feeling," or "no opinion."

52. The completed evaluation forms are sent to Eileen McMahon, an administrative employee. Ms. McMahon and her staff collect this information and "[compile] it and they summarize it into standard forms that we use for the [A]ssociate[s] [C]ommittee[']s purposes. . . . The summarizations are supposed to be verbatim with what the form says. . . ." Once the evaluations are summarized, the summaries are put in books that are sent to members of the Associates Committee so that each person on the committee gets the information that has been collated and summarized.

53. Each member of the Associates Committee is assigned the responsibility of reading the original evaluation forms in addition to the summaries for certain associates. That committee member drafts a memorandum concerning each of those associates assigned to him or her for this purpose. The mem-

orandum is distributed to the other members of the Associates Committee, usually the day before the meeting of the committee. This memorandum is called the "bottom line memo." The bottom line memo:

> . . . is intended to be [the Associates Committee member's] own personal view of what he has gleaned from the evaluations submitted at the time by the partners who submitted evaluation forms, *plus anything in addition that [the Associate Committee member] has gleaned from any interviews that he has conducted with respect to those evaluations*.

(emphasis added).

54. The bottom line memo becomes part of the package that each Associates Committee member has before him or her at the Associates Committee meeting.

55. In the years 1987, 1988, and 1989, the bottom line memos contained a "grid," reflecting the Associates Committee member's summary of that associate's letter grades in legal and personal skills for the preceding evaluation period.

56. Committee members do not receive the original individual evaluations as part of their packets. Mr. Strogatz explained that those documents would take too much time for the Associates Committee members to review. The members receive the bottom line memo with its grid as a starting point before the Associates Committee meets. They also receive the summary of evaluations compiled by Ms. McMahon, and reflected on standardized forms.

57. Mr. Strogatz testified that the Associates Committee has no formal voting procedures, but that sometimes the members poll themselves. The committee also formulates a performance review that will be given to each associate and the Associates Committee member who is responsible for giving that review is told at the meeting by the committee what the reviewer should say.

58. Since 1987, the judgment of the Associates Committee concerning a senior associate's prospects for partnership has been reflected on a form. The form lists as possible ratings for the associate's promotion to regular partnership as: "More likely than not," "unclear," "less likely than not," or "unlikely." Similar rankings are used for the likelihood of the associate's promotion to special partnership. That form is given to the associate at the oral review by the responsible Associates Committee member. At the oral review, the consensus of the Associates Committee regarding that candidate is communicated to the candidate by the responsible Associates Committee member.

59. The Chairman of the Associates Committee reports the recommendation of the committee to the Executive Committee, which has the ultimate authority for recommending to the full partnership the election of candidates to partnership. The full partnership does not vote on candidates not recommended.

60. In the period up to and including 1988, Ms. Ezold received strongly positive evaluations from almost all of the partners for whom she had done any substantial work. In 1987 and 1988, the process of evaluating the plaintiff's candidacy for partnership as a senior associate occurred, and written evaluations from all of the firm's partners were solicited.

61. In December 1986, Robert B. Wolf, a senior partner in the Corporate Department, wrote to Mr. Kurland:

> Just a note to express my great satisfaction with the manner in which Nancy Ezold has handled a claim against the Union League, which was forwarded to me by a classmate of mine in Boston.
>
> I like everything about the way Nancy has taken hold, including her research, her meeting with all opposing counsel and her handling of her clients.
>
> Nancy really is top notch.

62. Prior to his leaving Wolf, Block in 1987, Mr. Kurland believed that Ms. Ezold should be admitted to partnership. He wrote in his 1987 evaluation:

> Nancy is an exceptionally good courtroom lawyer, instills confidence in clients, gets things done, is unafraid and has all the qualifications for partnership. . . . What I envisioned about her when I hired her was a 'good, stand-up, effective courtroom lawyer' remains to be true and I think she has proven her case. . . .

63. In his 1987 evaluation of Ms. Ezold, Mr. Boote write that Ms. Ezold "is a valuable asset to the firm." He also wrote:

> [C]riminal, negligence, commercial contract cases are all well within her ability. Moreover, in these areas she presents herself to the court and clients as an effective representative of the firm. I would trust her to handle many significant [matters] on her own.

Mr. Boote voted with favor for partnership for Ms. Ezold in 1987 and 1988.

64. In 1988, Mr. Boote rated Ms. Ezold's legal analysis as "good." He had rated her as "acceptable" in that category in 1987.

65. In 1987, Steve Goodman, a partner in the Corporate Department and a member of the Executive Committee who had had substantial contact with Ms. Ezold, rated her overall legal skills and her legal analysis and legal writing abilities between "distinguished" and "good." He wrote:

> She worked very closely with Greg [Magarity] on an important matter for me and I was very favorably impressed with her work. She also successfully handled *a matter that required much legal analysis* and client hand holding.
>
> * * *
>
> She is one of the first people I call to handle any litigation matter. She has always justified my high confi-

> dence in her. . . . I sense some old *perceptions*—baggage—which should be revisited.

Mr. Goodman suggested that Ms. Ezold needed "Better p.r. [public relations]." (emphasis added).

66. Mr. Goodman wrote in his June 1988 evaluation of Ms. Ezold:

> I think she handles herself extremely well in both formal and informal settings. . . . She craves and reaches out for more responsibility. . . . Has shown industriousness, dedication, good judgment and client skills in several matters. I get the sense she should have [the] opportunity for greater independent responsibility.

67. In 1987, the last year in which he evaluated Ms. Ezold's legal analysis and writing ability, Mr. Schwartz, a Litigation Department partner, rated her in those areas as "good." He wrote: "Nancy has made tremendous progress over the years. As her confidence has grown from front line experience her abilities have expanded. She is a top-flight associate." He added Ms. Ezold "will make a fine partner." In 1988, he rated Ms. Ezold distinguished in all personal qualities, a grade he also gave to her informal speech skills and negotiating skills.

68. Mr. Davis, the Chairman of the Litigation Department at the time, wrote in his June, 1988 evaluation of Ms. Ezold:

> Last year I assigned Nancy to assist me in the Home Unity Securities Litigation and a related SEC investigation. Complex civil litigation was new to her. She had to learn about pretrial orders, class certification, responses on objections to lengthy sets of interrogatories and all of the other sophisticated phases of such litigation. With the help of forms from other cases, she produced first class documents. She also managed two complex document productions, including inspection, developing a privilege list, both stamping and putting out the daily brush fires between counsel. Her ability to become so useful and effective in so short a time was truly amazing. Opponents

> respect her. The Home Unity Officers and Directors are crazy about her, and have said so. Nancy is another one of those people who is here weekends and nights—she has difficult family responsibilities. She never complains about workload and is always available. She is one of two or three people who will march into court and handle a preliminary injunction on an hour's notice. The Home Unity case was the first really fair test for Nancy. I believe that her background relegated her to . . . matters (where she got virtually no testing by Wolf, Block standards) and small matters. She is much, much better than that. I could handle any case with Nancy and she will soon be able to handle major cases independently—she can do so now, in my opinion, in consultation with an experienced partner. Moreover, she can try cases because of her guts and maturity. This is not true of all of our litigators.

69. Mr. Davis stated that when he wrote his evaluation of Ms. Ezold in 1988, he believed "that it had been established that Nancy had excellent skills in various areas of litigation, including case management, document management, witness preparation, dealing with opponents, professionalism, maturity, aggressiveness and a whole series of other traits that I considered to be extremely useful to the department." He believed she could make a valuable contribution as a junior partner in the Litigation Department.

70. Raymond Bradley, a senior litigation partner, wrote in his June, 1988 evaluation of Ezold:

> Although my contacts with Nancy have not been extensive, I have had the opportunity to review several briefs that she wrote and to discuss with her problems on which she was working. I have been impressed by her ability to grasp issues and to think and write about them creatively. She has a good sense of what can and cannot be accomplished. . . . I think Nancy is a very hard worker who is enthusiastic about her assignments and committed to the interests of the firm and its clients. . . . She gets things done. Writes very well. Has a good eye for the practical.

71. Ms. Ezold's overall score in legal skills in the 1988 bottom line memorandum presented to the Associates Committee was a "G" for good. It was noted that "overall" she received that year "stronger grades in intellectual skills than last time."

72. The plaintiff, as an associate, needed supervision and guidance from partners, as do most, if not all, associates. The mistakes of the plaintiff were not of a greater magnitude or type than were those of male associates who made partner.

73. The test that was put to the plaintiff by the Associates Committee that she have outstanding academic credentials and that before she could be admitted to the most junior of partnerships, she must demonstrate that she had the analytical ability to handle the most complex litigation was not the test required of male associates.

74. Mr. Davis, Chairman of the Litigation Department of the Firm, testified regarding the erosion of the standards of the associate pool at the Firm:

> At the time we were required to work three nights a week and, if you were smart, you would work four, and you would work on Saturdays. We were always having lunch together, dinner together. The discussion would always be about the law. We would write briefs. We would spend hours on a sentence. We would turn out product that was worthy of General Motors for Sam's Gas Station, because that's who we represented.
>
> The place was indescribably brilliant. And it just isn't that way today. With all deference to some of my young partners who are sitting out there, and they are very, very good, you can't even imagine the way it was in the 1960s. And as time went by, instead of getting the top offers from law officers of Law Review, we began to get people who didn't make officer at Law Review, and then we started to go off Law Reviews and then started going deeper into classes, and thankfully, because discrimination started to relax and erode, we began competing in the market with everybody else. And as a result, the pool of people we had

> to choose from was the same pool of people everybody else had to choose from, and there were good people and bad people and mediocre people and medium people.

75. Male associates who received evaluations no better than the plaintiff and sometimes less favorable than the plaintiff were made partners.

(1) Male Associate A

76. Associate A, an associate in the Litigation Department, was recommended by the Associates Committee in 1988. Robert Fiebach, who stated that he had had "substantial contact" with Associate A's work, wrote in his 1986 evaluation of him:

> I really don't think [Associate A] should become a partner. In fact, if he is made a partner, I will never again submit an evaluation on any associate. I don't know how he has lasted this long in the firm.

77. Mr. Fiebach testified that his 1987 evaluation showed that Associate A had made "substantial improvement." In Mr. Fiebach's 1988 evaluation of Associate A, Mr. Fiebach did not mark Associate A as distinguished in any category, but he "found enough skills in the good and acceptable category to be comfortable recommending him for partner." He marked Associate A's legal analysis "acceptable." Thus, according to Mr. Fiebach, Associate A had substantially improved to the level of "acceptable" in legal analysis, a rating lower than the overall rating in that area that Ms. Ezold received in her bottom line memo.

78. Barry Klayman, a partner in the Litigation Department, wrote in his fall 1986 evaluation that he "could not rely on [Associate A] to back [him] up in the office while [Klayman] was in court. [Associate A's] writing is dense and mediocre. He missed target dates for completing projects and then hurriedly slapped together something when I complained."

79. Mr. Davis wrote in his 1985 evaluation of Associate A:

> At first glance his work looks adequate, if uninspired. However, if you dig under the surface you find a lack of professionalism, both in terms of legal analysis and research. The case on which I worked most deeply with Associate A was a preliminary injunction action in Federal Court. He alleged jurisdiction under the wrong statute and missed a pertinent Supreme Court case that would have shot out at him from rudimentary shepardizing of cases he did cite. The complaint was drafted with bare bones adequacy and the memorandum was superficial and uninspired. The client ~~did~~ not feel that [Associate A] was terribly interested in his case and mentioned his concerns to me. [Associate A] must be useful in our woefully understaffed department because he will take on matters and does get the paper out. However, his work product *should* be below our minimum standards and I believe his intellectual laziness will someday embarrass us.

80. Mr. Davis wrote in his 1988 evaluation of Associate A:

> [Associate A] is strictly average. I think he would fade into the background in a group of adversaries representing multiple interests in a complex matter. He does not have or give the appearance of having a winning attitude. I do not believe he will ever attract significant business. His principal strength seems to be that he has not seriously offended anyone important and is useful as a utility man. In my opinion, we have enough partners like [Associate A].

81. In his 1988 evaluation of Associate A, David Kaufman, a partner in the Estates Department, ranked Associate A's writing skills as "unacceptable." David Glyn, another partner in the Estates Department, rated Associate A's abilities in those areas as "marginal," and concurred in Kaufman's view that Associate A "should receive help with writing skills."

82. In 1988 the year in which he was recommended for partnership, Associate A had legal skills that were characterized by

Mr. Arbittier as: "Acceptable—Barely adequate." Mr. Arbittier also described him as "[n]ot real smart."

83. In 1988, Anthony Minisi, a litigation partner, evaluated Associate A as follows: "[Associate A] worked on a major matter for me and was not responsible. He was extremely slow in responding."

84. In 1986, Mr. Strogatz wrote that "the partnership issue for [Associate A] depends upon what our standard is going to be."

85. In 1987, Mr. Strogatz wrote: "[Associate A] is pretty good overall, but not quite good enough." Mr. Strogatz wrote that he was concerned that Associate A "may not be bright enough."

86. Associate A's bottom line grid for 1988 summarized his legal analysis grades as "good" and his writing and research as between "acceptable" and "good." His overall ratings thus were lower than those of Ezold.

(2) Male Associate B

87. The Associates Committee recommended Associate B, a litigation associate, for partner in the fall of 1989.

88. In May 1989, David Simon, a litigation partner who described his experience with Associate B as "extremely extensive," stated in a memorandum to the Associates Committee: "There has been a recurrent problem where he simply disappears without notice, sometimes for a couple of days, and sometimes on extended vacations." Mr. Simon also described Associate B's "lack of judgment in dealing with a major client" that almost resulted in the defendant's losing a million dollars a year in billing.

89. Mr. Arbittier wrote of Associate B in 1989:

> He just creates the impression that he is bright, but I really don't know for sure. If others like him, I would be happy to see him admitted. He seems like a nice guy who would favorably impress clients.

The 1989 evaluation form shows that Mr. Arbittier's contact with Associate B in the prior year was "none."

90. In 1988, Mr. Arbittier had described his "impression" of Associate B:

> Seems bright, but he is a bit of a con man. Not as smart as he seems or thinks he is. Nevertheless, I think he has potential. More sizzle than steak.

91. Mr. Schwartz wrote of Associate B in 1988, the year before his admission to partnership: "He's just too slick to instill . . . that degree of comfort." Norman Goldberger, another litigation partner, wrote:

> . . . I'm beginning to think he doesn't want to work hard or on difficult matters. Maybe he has trouble juggling but I'm beginning to believe he doesn't go the entire mile.

92. In the same year, Ms. Liebenberg wrote:

> I think [Associate B] is very lazy and when an assignment or case does not interest him, he only gives the matter minimal attention. I have been very disappointed in the work he has done for me to date. . . . The client has been very unhappy with [Associate B's] performance. He was late in completing the assignment and did not follow through with the client's problem.

Ken Warren, a litigation department partner, also wrote of Associate B in 1988:

> [He] needs to apply himself diligently to learn more. He does not seem willing to do this . . . . [He] is too anxious to give his work to others. He needs to take a task from start to finish. He appears to work to avoid responsibility.

93. Associate B became a partner in February 1990.

(3) Male Associate C

94. Associate C, an associate in the Real Estate Department, was recommended by the Associates Committee in 1987. In the 1987 Associates Committee bottom line memo, he received an overall grade of "G," the same as that which Ms. Ezold had received. The summary of evaluations used by the Associates Committee noted that Henry Miller, a partner in the Real Estate Department, had changed Associate C's legal analysis score to ["acceptable"] and suggested that an "adequate [score] may well be sufficient in his mind for regular partnership."

95. Associate C became a partner in February 1988.

(4) Male Associate D

96. Associate D, an associate in the corporate department, was recommended for partner by the Associates Committee in 1988. In the 1988 evaluation summary sheet reviewed by the Associates Committee, three partners said that Associate D needed help with his writing skills.

97. In 1987, Mr. Strogatz described Associate D as "not institutionally dedicated." He also said that Associate D was "not particularly able" in "client servicing and development." The prior year Mr. Strogatz had written that Associate D had "not applied himself in such a way as to develop into a first-rate lawyer . . . I am not impressed."

98. In 1988, J. Goldberg, a partner in the Corporate Department, wrote in his evaluation that Associate D "[t]ends to shoot from the hip. Leaves me with a feeling of uncertainty . . . ."

99. At the same time, Joseph Manko, a partner in the environmental law department, wrote that Associate D was "less than 'tactful.' "

100. Associate D became a partner in February 1989.

(5) Male Associate E

101. Mr. Strogatz stated that Associate E was not a star and that an associate did not need to be a star to be a partner. He

also wrote that he thought of Associate E "as a guy just to do work."

102. Associate E, who was in the Estates Department, was made partner in 1987.

(6) Male Associate F

103. The grid on Associate F's bottom line memo in 1988, the year before his consideration for partnership, reflected a composite grade of "G–" for legal analysis.

104. Associate F had graduated from Villanova Law School and had not been on Law Review.

105. In 1989, the year in which he was recommended for partnership, Associate F was described by Alan Kaplinsky, a partner in the Corporate Department, as having as a weakness: "His outrageous personality. He offended terribly my father-in-law in connection with work which he did for him a year or so ago. My father-in-law changed law firms as a result."

106. John Schapiro, then a partner in the Tax Department wrote of Associate F: "A little superficial and hipshooting."

107. The prior year Donald Joseph, a partner in the Litigation Department, had rated Associate F's legal skills as acceptable, noting "a shoddiness in clear thinking or maybe lack of full experience."

108. At the same time, Michael Temin, a partner in the Corporate Department, recommended that Associate F receive help in his writing and drafting skills.

109. Norman Goldberger in 1987, described inappropriate conduct by Associate F:

> [Associate F] was supposed to be handling a matter for Henry Miller's client, Hart. I was asked to step in and help supervise. [Associate F] immediately abandoned ship. He failed to follow up with local counsel, call me, provide me with papers or do anything related to the case. Indeed,

when called upon by my secretary to provide information, his response was that the case was my case and not his.

110. In 1986, William Rosoff evaluated Associate F:

> [H]e is sometimes too fast or flip or not attentive enough. In one matter, he failed to collect on a letter of credit on the grounds that he supposed Al Braslow would handle that part of the matter, when it was an inappropriate assumption to make especially without talking to Al. In another matter, the time for answering a complaint expired. While he might have thought someone else was seeing to it, he should have double checked.

111. Associate F became a partner in February 1990.

(7) Male Associate G

112. In the bottom line memorandum on Associate G for 1987, the year before he became partner in the Corporate Department, his grid reflected no composite score higher than "G." In four of the legal skills, including legal research and promptness, Associate G was rated only "acceptable."

113. In his 1987 evaluation Associate G was rated "acceptable" in legal analysis by Alan Molod, a partner in the Corporate Department. Mr. Molod added that Associate G was "Not a Star" and was "Sloppy at times and [showed] occasional lapses in judgment."

114. Ronald Wiener, a partner in the Tax Department, wrote in his 1987 evaluation that Associate G "is sometimes too wish-washy and immature; at other times he takes a very extreme 'hard-nosed' and confrontational approach. He needs to be more consistently firm and businesslike and in control."

115. Associate G was admitted to partnership in February 1988.

(8) Male Associate H

116. Mr. Arbittier wrote in his 1987 evaluation of Associate H:

> [Associate H] has really let me down in his handling of a case for General Electric Pension Trust. He missed the crux of the case in the beginning and dragged his feet terribly in getting it back on track. . . . [Associate H] works very hard, but hard work alone is not enough. I have my doubts that he will ever be anything but a helper who does what he is told adequately but with no spark.

Mr. Arbittier wrote that Associate H was trying "to change my view of him and I am giving him a second chance. He [has] brains. Maybe he can change." Mr. Arbittier also called Associate H "phlegmatic, diffident, nonassertive and unimaginative," and in 1988 wrote that he was "[not] real strong in legal analysis or in focusing on the key issues (dividing the wheat from the chaff)."

117. In 1989, Mr. Arbittier concluded that Associate H was a "nice guy" who had made improvement: he supported Associate H for partnership. Mr. Arbittier explained Associate H's "redemption"; Associate H told Mr. Arbittier how he had been overworked.

118. Associate H became a partner in February 1990.

119. The plaintiff's analytic skills were assessed in the bottom line memo in her final year as the second highest potential rank, "good," which, according to Wolf, Block standards means: "Displays particular merit on a consistent basis; effective work product and performance; able; talented."

120. The plaintiff was criticized by her supervisors for not being "politic" when she pressed for some matter relating to her personally. Some male associates were criticized on their evaluations for not being assertive.

121. In the magnitude of its complexity, a case may have a senior partner, a younger partner, and an associate(s) assigned

to a case. Accordingly, requiring the plaintiff to have the ability to handle on her own any complex litigation within the firm before she was eligible to be a partner was a pretext.

122. Mr. Strogatz, Chairman of the Associates Committee, recalls a discussion, possibly at an Associates Committee meeting, that Ms. Ezold "sees things . . . as being in discrimination terms."

123. Mr. Strogatz testified about a memorandum memorializing complaints against Associate X of sexual harassment. Secretaries and paralegals said Associate X had touched them or pestered them. The memorandum states that Mr. Strogatz had arranged to have Arden Resnick, an administrative employee in the personnel department, talk to Associate X in a "low-key manner" about those past incidents, and the memorandum recounted a more recent incident where Associate X had touched and flirted in an unwelcome fashion with a secretary. Mr. Strogatz' memo described the secretary as "afraid."

124. Mr. Strogatz testified that his job was not to determine the truth of the allegations against Associate X; he wrote that he did not believe Associate X's story concerning the incident.

125. Mr. Strogatz also stated that he did not feel that the incident concerning Associate X was relevant to considerations of whether or not the candidate was an acceptable candidate for partnership, and he did not report it to the Associates Committee in its deliberations.

126. Although the plaintiff received consistently outstanding compliments for her relationship with clients, Mr. Strogatz explained his marginal rating of Ms. Ezold on this aspect was not based on any facts, but was based on his view that a "prima donna" such as Ms. Ezold would probably not be very good with dealing with clients.

127. In the plaintiff's early years at Wolf, Block, she suggested to Mr. Schwartz that an unfairness in case assignment may have occurred because she was female. Mr. Schwartz replied: "Nancy, don't say that around here. They don't want to hear it."

128. The plaintiff was identified as too involved in women's issues by Mr. Schwartz, who wrote in his 1986 evaluation of her that "her judgment can be clouded by over sensitivity to what she misperceives as women's issues." That evaluation was submitted in the ordinary course to the Associates Committee and was discussed by the Associates Committee. Mr. Rosoff testified that he reviewed Mr. Schwartz' evaluation during his review of the Associates Committee's decision on Ms. Ezold, and noted that comment concerning women's issues as he reviewed her file.

129. Mr. Schwartz recalled Ms. Ezold's expression of concern for paralegals employed by the defendant as a "women's issue." The plaintiff had discussed with Mr. Schwartz complaints by paralegals that they were not paid for overtime hours, for work at night or on weekends. Virtually all of the litigation paralegal staff was female.

130. The defendant asserted that Ms. Ezold had misperceived the problems of the virtually all female paralegal staff as a "women's issue." Mr. Fiebach, however, stated that he brought up the issue of attorneys working part-time at Wolf, Block, which was "well known to be a women's issue." Mr. Strogatz stated that Mr. Fiebach was *not* using bad judgment in raising that question as a women's issue. Ms. Ezold's characterization of matters affecting largely female groups as "women's issues" was evaluated differently.

131. The fact that a male associate had engaged in sexual harassment of female employees at the Firm was seen as insignificant, not worthy of mention to the Associates Committee in its consideration of the male associate for partnership. This despite the fact that "integrity" is a minimal requirement for partnership at the Firm according to the testimony of members of the Associates Committee.

132. The plaintiff was criticized for being "very demanding" and was expected by some members of the Firm to be non-assertive and acquiescent to the predominately male partnership. Her failure to accept this role was a factor which resulted in her not being promoted to partner. However several male

associates who had been evaluated negatively for *lacking* sufficient assertiveness in their demeanor *were* made partners.

133. Mr. Kopp, Chairman of the Executive Committee, offered Ms. Ezold a partnership in one year if she took over the Domestic Relations Division of the Litigation Department. It was the history of the Firm that the recommendation of the Executive Committee of an associate for admission to partnership was followed without exception.

134. Before Ms. Ezold could be admitted to partnership, she would have to serve an additional year as an associate. The additional year was not for purposes of giving any additional training or experience. Accordingly, the Chairman of the Executive Committee was satisfied that in 1988 the plaintiff had all the requisites to be a member of the Firm at that time.

135. Gender was a determining factor in the failure of the Firm to promote the plaintiff to partnership in 1989.

CONSTRUCTIVE DISCHARGE

136. On October 18, 1988, the Chairman of the Litigation Department, Mr. Davis, and two members of the Associates Committee, Arthur Block and Norman Goldberger, met with Ms. Ezold and advised her that she would not be recommended for admission as a regular partner effective February 1, 1989. She was told that too many partners did not believe she had sufficient legal analytical ability to handle complex legal issues. However, they also emphasized to her that the Firm very much wanted her to stay.

137. On November 16, 1988, Ms. Ezold met with Mr. Kopp, Chairman of the Executive Committee, who told her that the Executive Committee would not be recommending to the partnership that she be admitted as a partner effective February 1, 1989. However, Mr. Kopp told her that the two partners who had handled the Firm's domestic relations work (David Hofstein and Judith Widman) had announced their decision to leave the Firm several days earlier, and the immediate staffing

need in this practice created by their impending departure enabled him to offer her a position which had not been anticipated previously. He told Ms. Ezold that, in light of the particular skills that the Executive Committee had been told that she possessed, he believed she would be well-suited and well-qualified to head up the Firm's domestic relations practice (which was part of the Litigation Department), and if she agreed to do so, he promised that she would be made a regular partner in one year.

138. In deciding to make the domestic relations partnership offer to Ms. Ezold, Mr. Kopp took into consideration the fact that he believed the legal issues which arise in the domestic relations matters handled by Wolf, Block are generally not as complex as those which arise in commercial litigation matters. He also took into consideration the fact that Wolf, Block had an immediate and pressing need to fill the vacuum which would soon be created by the impending departure of Mr. Hofstein and Ms. Widman.

139. Ms. Ezold told Mr. Kopp that her reaction to the domestic relations partnership offer was negative. Mr. Kopp told her that even if she did not accept that offer, the Firm nevertheless wanted her to stay, and she could continue doing the same type of general litigation work she had done in the past and would receive a substantial increase in salary.

140. Subsequent to her meeting with Mr. Kopp, Ms. Ezold did speak with Mr. Magarity, Mr. Schwartz and Mr. Davis concerning the domestic relations partnership offer, and none of them told her that they believed that this offer was inappropriate or that acceptance of it would be harmful to her career.

141. Shortly after her meeting with Mr. Kopp, Ms. Ezold had a couple of meetings with Mr. Rosoff to discuss the domestic relations partnership offer and her future prospects for partnership if she declined that offer. Mr. Rosoff told her that Wolf, Block operates on a consensus basis with respect to partnership admission decisions, and a number of partners did not believe that she had sufficient legal analytical ability to handle complex legal issues. He urged her to accept the domestic relations

partnership offer and told her that acceptance of that offer would not preclude her from also handling general litigation matters. Ms. Ezold rejected the domestic relations offer, but told Mr. Rosoff she would be willing to head up the domestic relations practice for up to one year. However, Mr. Rosoff told her the Firm was not interested in having her head up the domestic relations practice merely on a short-term basis.

142. Mr. Rosoff reiterated to Ms. Ezold that the Firm wanted her to stay and told her she "could stay as long as she wanted." He told her that although he could not assure her of a partnership in the future if she declined the domestic relations partnership offer, she would be considered for partnership in the future. He also told her that she would receive substantial pay increases beginning in the following July, when semi-annual raises are customarily given to the Firm's associates, but would not give her a pay raise that was then being given to the other members of her class.

143. The domestic relations practice at Wolf, Block was formerly headed by a male (Mr. Hofstein), and a number of different male partners handled domestic relations matters prior to the time Mr. Hofstein came to the Firm. Domestic relations matters are now handled by two of Wolf, Block's senior male partners (Gerald McConomy and Anthony Minisi).

144. The domestic relations practice at Wolf, Block is part of the Litigation Department, and Ms. Ezold admitted that the Firm's domestic relations lawyers "went into court probably the same or a little more" than the other lawyers in the Litigation Department.

145. Ms. Ezold admitted that she did not consider her working conditions at Wolf, Block to be "intolerable" prior to the January 24, 1989 partnership vote.

146. No partner at Wolf, Block told Ms. Ezold that the Firm wanted her to leave.

147. Ms. Ezold was not harassed, belittled or otherwise pressured to leave Wolf, Block.

148. None of the cases that Ms. Ezold was working on at the time of the January, 1989 partnership vote were taken away from her or re-assigned, and Mr. Davis continued to assign her new cases. Ms. Ezold admitted that she remained "busy" and "fully occupied" after the partnership decision.

149. Ms. Ezold tendered her resignation in May, 1989 after she had secured higher-paying employment as President of BES Environmental Specialists (a Wolf, Block client) and an "Of Counsel" position with the law firm of Rosenthal and Ganister because she reasoned that her advancement at the Firm had reached a plateau.

150. Ms. Ezold quit working at Wolf, Block on June 7, 1989.

151. Ms. Ezold's working conditions at Wolf, Block were not intolerable, and a reasonable person in her position would not have felt compelled to leave.

CONCLUSIONS OF LAW

1. The plaintiff has fully complied with the administrative prerequisites for Title VII litigation. 42 U.S.C. § 2000e-5.

2. Under Title VII, the burdens and order of proof are as follows:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Chipollini v. Spencer Gifts, 814 F.2d 893, 897 (3d Cir.1987) (quoting *Texas Department of Community Affairs v. Burdine*,

450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981)); *see also Roebuck v. Drexel University*, 852 F.2d 715, 731 (3d Cir.1988).

3. Therefore, a plaintiff in a sex discrimination case can establish a prima facie showing of promotion discrimination by demonstrating that she is a member of the protected class, that she was qualified for the position, that she was not promoted into a job for which she was qualified, and that the position was given to a male. See *Dillon v. Coles*, 35 FEP Cases 1239, 1242 (E.D.Pa.1983), *aff'd*, 746 F.2d 998 (3d Cir. 1984).

4. A plaintiff's burden of proof at the prima facie stage is easily met. *See Bhaya v. Westinghouse Electric Corporation*, 832 F.2d 258, 260 (3d Cir.1987), *cert. denied*, 488 U.S. 1004, 109 S.Ct. 782, 102 L.Ed.2d 774 (1989), *citing Massarsky v. General Motors Corp.*, 706 F.2d 111 (3d Cir.1983).

5. A plaintiff need not demonstrate on her prima facie case of promotion discrimination that she was the most qualified, but only that she fell in the general range of those considered by a defendant for promotion. *See Easley v. Empire, Inc.*, 757 F.2d 923, 930 n. 8 (8th Cir.1985).

6. The plaintiff here has made a prima facie showing of promotion discrimination. Her evaluations by the partners who worked most closely with her, and the bottom line memo which summarized her reviews, establish her qualification for partnership at Wolf, Block. Several male associates with lesser evaluations were made partners.

7. After a plaintiff has established a prima facie case, the burden of going forward then shifts to the defendant "to dispel the adverse inference by articulating 'some legitimate, nondiscriminatory reason for the employee's rejection.' " *Duffy v. Wheeling Pittsburgh Steel*, 738 F.2ed 1393, 1395 (3d Cir.), *cert. denied*, 469 U.S. 1087, 105 S.Ct. 592, 83 L.Ed.2d 702 (1984), *quoting Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981).

8. A Title VII defendant's articulated reasons for the adverse employment decisions must be reasonably clear and specific if the defendant is to succeed in rebutting plaintiff's prima facie showing of discrimination. *See Burdine*, 450 U.S. at 255-56, 101 S.Ct. at 1094-95.

9. If the defendant succeeds in articulating a legitimate nondiscriminatory reason for its decisions, the plaintiff then "must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision . . . [she] may succeed in this either directly by persuading the [trier of fact] that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256, 101 S.Ct. at 1095 (citations omitted).

10. "A showing that a proffered justification is pretextual is itself *equivalent* to a finding that the employer intentionally discriminated." *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1396 (3d Cir.), *cert. denied*, 469 U.S. 1087, 105 S.Ct. 592, 83 L.Ed.2d 702 (1984), *citing McDonnell-Douglas v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973); *see also Chipollini*, 814 F.2d at 900. Pretext may be shown through the presentation of indirect or circumstantial evidence, or evidence that demonstrates inconsistencies or implausibilities in the employer's proffered reasons for its employment action. *See Chipollini*, 814 F.2d at 899-900.

11. Ms. Ezold has established that the defendant's purported reasons for its conduct are pretextual. The defendant promoted to partnership men having evaluations substantially the same or inferior to the plaintiff's, and indeed promoted male associates who the defendant claimed had precisely the lack of analytical or writing ability upon which Wolf, Block purportedly based its decision concerning the plaintiff. The defendant is not entitled to apply its standards in a more "severe" fashion to female associates. *See Green v. United States Steel Corp.*, 481 F.Supp. 295, 313 (E.D.Pa.1979) (policy of rejecting applicants for "material misrepresentations" must be applied alike to all races); *Walker v. Robbins Hose Co.*, 465 F.Supp. 1023, 1035

(D.Del.1979). Such differential treatment establishes that the defendant's reasons were a pretext for discrimination. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282-83, 96 S.Ct. 2574, 2579-80, 49 L.Ed.2d 493 (1976).

12. Other instances of conduct by the defendant Firm toward Ms. Ezold support the conclusion that the plaintiff was treated differently because of her gender. Ms. Ezold was evaluated negatively for being too involved with women's issues in the Firm, specifically her concern about the treatment of paralegals. Mr. Fiebach, a member of the Firm, was not reproached for raising the issue of part-time attorneys, which he himself characterized as a "women's issue." In addition, the fact that a male associate had engaged in sexual harassment of female employees at the Firm was seen as insignificant and not worthy of mention to the Associates Committee in its consideration of that male associate for partnership. Ms. Ezold was also evaluated negatively for being "very demanding," while several male associates who were made partners were evaluated negatively for *lacking* sufficient assertiveness in their demeanors. Finally, Ms. Ezold was the target of several comments demonstrating the defendant's differential treatment of her because she is a woman.

CONSTRUCTIVE DISCHARGE

13. In order to establish constructive discharge, the plaintiff must establish that the employer knowingly permitted conditions of discrimination so intolerable that a reasonable person would feel compelled to resign. *See Spangle v. Valley Forge Sewer Authority*, 839 F.2d 171, 173 (3d Cir.1988), *citing Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 888 (3d Cir. 1985).

14. Constructive discharge cannot be based upon the employee's subjective preference for one position over another. *See Jett v. Dallas Independent School Dist.*, 798 F.2d 748, 755 (5th Cir.1986), *aff'd in part, remanded in part*, 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989); *Kelleher v. Flawn*,

761 F.2d 1079 (5th Cir. 1985); *Neale v. Dillon*, 534 F.Supp. 1381, 1390 (E.D.N.Y.), *aff'd*, 714 F.2d 116 (2d Cir.1982).

15. A denial of promotion, even if discriminatory, does not alone suffice to establish constructive discharge. *See Nobler v. Beth Israel Medical Center*, 702 F.Supp. 1023, 1031 (S.D.N.Y. 1988).

16. A reasonable person in Ms. Ezold's position would not have deemed her working conditions to be so intolerable as to feel compelled to resign.

ORDER

AND NOW, this 27th day of November, 1990, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED:

(1) As to the Plaintiff's claim that the Defendant refused to promote the Plaintiff to partner on the basis of her gender, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., judgment is entered in favor of the Plaintiff, Nancy O'Mara Ezold, and against the Defendant, Wolf, Block, Schorr and Solis-Cohen;

(2) As to the Plaintiff's claim that the Defendant constructively discharged the Plaintiff by creating intolerable working conditions that compelled the Plaintiff to resign, judgment is entered in favor of the Defendant, Wolf, Block, Schorr and Solis-Cohen, and against the Plaintiff, Nancy O'Mara Ezold.

UNITED STATES DISTRICT COURT
E.D. PENNSYLVANIA

Civ. A. No. 90-0002

March 15, 1991

Nancy O'Mara EZOLD

—v.—

WOLF, BLOCK, SCHORR AND SOLIS-COHEN

MEMORANDUM AND ORDER

JAMES MCGIRR KELLY, *District Judge*.

On November 27, 1990, this court held that the defendant law firm, Wolf, Block, Schorr and Solis-Cohen, had violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, by considering the gender of the plaintiff, Nancy Ezold, in its decision not to admit her to the partnership. 751 F.Supp. 1175. This court also held however that Ms. Ezold was not constructively discharged by virtue of the adverse partnership decision. As the parties had agreed prior to trial to bifurcate the issues of liability and damages, the issue of appropriate damages is now before the court.

In compliance with the court's request, the parties have submitted memoranda as well as replies addressing the scope of relief available to Ms. Ezold in light of her having prevailed on the Title VII liability issue. Ms. Ezold asserts that she is entitled to backpay as well as instatement as a partner in the firm. In the event that instatement as a member of the firm were deemed impractical, Ms. Ezold asserts that front pay is appropriate. In response Wolf, Block asserts that because the court held that Ms. Ezold was not constructively discharged by virtue of the defendant's adverse partnership decision, her relief for

the Title VII violation is limited to back pay covering the period between the date her unlawfully denied partnership would have become effective, February 1, 1989, and the date she resigned her associate position with the Firm on June 7, 1989.

For reasons stated more fully below, I will not limit the scope of damages to back pay only up to the date of the plaintiff's resignation from the defendant firm. The appropriate relief within the scope of Title VII here may include back pay up the date of judgment and instatement as a member of the firm or, alternatively, front pay. Trial before this court on the issue of damages should thus address those remedies as well as the plaintiff's duty of mitigation under Title VII.

SUMMARY OF FACTS

A brief review of the facts of this case is appropriate. The plaintiff, Nancy Ezold, was hired by the defendant law firm, Wolf, Block, as an associate on partnership track basis in 1983 and was assigned to the Firm's Litigation Department. Ms. Ezold had previously worked as an associate with small law firms for a period of three years. Wolf, Block is a Philadelphia-based firm comprised of approximately 250 attorneys, approximately half of whom are partners. Throughout Ms. Ezold's nearly six-year tenure as an associate at the Firm, which ended with her resignation on June 7, 1989, she became aware of signs that the Firm was treating her in a gender-discriminatory manner.

During her 1983 hiring interviews, Ms. Ezold was told by the then Chairman of the Litigation Department, Mr. Kurland, that it would not be easy for her at Wolf, Block because she was a woman, was not from an Ivy League law school (Ms. Ezold is a graduate of Villanova Law School), and was not on Law Review. During her time as an associate at the Firm, Ms. Ezold worked for partners in the Litigation Department on criminal matters, insurance cases, general commercial litigation and other areas. Ms. Ezold was primarily assigned cases that were small by Wolf, Block standards. Ms. Ezold did not work for

more than 500 hours on any one matter in any year, whereas virtually all the male associates in the department worked on major matters for which they logged at least 600 hours per year. Ms. Ezold complained about the quality of her assignments and the limited number of partners she was assigned to work with. The Litigation Department Chairman acknowledged the inferiority of Ms. Ezold's work opportunities and promised to correct them.

During the last two years of her employment at Wolf, Block, Ms. Ezold's work at the Firm included supervising junior associates in their preparation of briefs and pleadings. In 1988 the Chairman of the Litigation Department, Mr. Davis, gave Ms. Ezold an outstanding review for her work on a complex matter. At trial on the liability portion of this case, Mr. Davis stated that when he evaluated Ms. Ezold he believed it had been established that she had excellent skills in various areas of litigation, including case management, witness preparation, dealing with opponents, professionalism, maturity, aggressiveness and a whole series of other traits he considered to be extremely useful to the Department. Mr. Davis' evaluation of Ms. Ezold is consistent with virtually all of the evaluations of Ms. Ezold by partners with whom she worked. Those partners who evaluated Ms. Ezold neutrally or critically cited the lack of complexity in her assignments or their lack of sufficient contact with her necessary to make a meaningful evaluation.

In October of 1988 Ms. Ezold was informed that she would not be recommended for partnership because too many partners did not believe she had sufficient analytical ability to handle complex legal issues. The test that the Firm applied to the plaintiff for purposes of determining whether to recommend her for partnership was that she must demonstrate the analytical ability to handle the most complex litigation. This standard was stricter than that applied to male associates who were candidates for partnership along with Ms. Ezold. Many of the male associates who were admitted as partners effective February 1, 1989, had received numerous evaluations severely critical of their work.

In November of 1988, the Chairman of the Firm's Executive Committee, Mr. Kopp, confirmed to Ms. Ezold that she would not be recommended for admittance to the partnership. Mr. Kopp offered Ms. Ezold partnership in the Firm's Domestic Relations Department if she would remain an associate for one more year. After trial in this matter, I determined that the Firm had considered Ms. Ezold's gender in its 1988 decision not to promote her to partner in violation of Title VII of the Civil Rights Act of 1964.

DISCUSSION OF AVAILABLE RELIEF

I. *Remedial Authority of the Federal Courts under Title VII*

The remedial scope of Title VII, as first enunciated in section 706(g) of the Civil Rights Act of 1964, is broad:

> If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice . . . the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay . . . or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g) (1988).

This language may be read as a mandate for the exercise of broad discretion in crafting effective remedies for employment discrimination. The broad remedial power of the courts under Title VII to remedy unlawful employment discrimination was embellished by the legislative history to the 1972 amendments to the Civil Rights Acts in which Congress revised section 706(g):

> The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible . . . [T]he scope of relief . . . is intended to make the victims of unlawful discrimination whole . . . so far as possible, [to

> return them] to a position where they would have been were it not for the unlawful discrimination.

118 CONG. REC. 7168 (1972).

The Supreme Court has interpreted this statutory language to mean that "federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of . . . [employment discrimination]." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764, 96 S.Ct. 1251, 1264, 47 L.Ed.2d 444 (1976) (footnote omitted). That the courts were given broad equitable powers by Congress confirms the purpose of Title VII to make whole victims of discrimination in the workplace. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405. 420-21, 95 S.Ct. 2362, 2372-73, 45 L.Ed.2d 280 (1975). Such a statutory purpose will only be accomplished if the remedial structure of Title VII is flexible, thus enabling the courts "to put a victim of discrimination in the position that she or he would have been in but for the unlawful discrimination." *Hopkins v. Price Waterhouse*, 920 F.2d 967, 976 (D.C.Cir. 1990).

The flexible "make whole" approach to Title VII remedies authorized by Congress does not absolve a district court of the responsibility to measure possible remedies alongside the purposes of Title VII carefully. Broad equitable discretion must be complemented with "the principled application of standards consistent with those purposes . . . " *Albemarle Paper*, 422 U.S. at 417, 95 S.Ct. at 2371. In determining what standards of application would be consistent with Title VII, it is noteworthy that one of the specific congressional concerns motivating the 1972 amendments to Title VII was "the need to tear down discriminatory barriers in the top echelons of the job market that continued to prevent women and minorities from 'ascend[ing] the higher rungs in professional life.' " *Hopkins*, 920 F.2d at 977.

The language of section 706(g) specifically provides for backpay as an appropriate Title VII remedy. As an incentive for employers to eliminate discriminatory practices, back pay has a direct connection with Title VII's primary objective of

achieving "equality of employment opportunities and [removing] barriers that have operated in the past. . . ." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971). Reinstatement, or alternatively front pay, may also be appropriate Title VII remedies for returning a victim of discrimination to the position he or she would have occupied absent the discrimination. Several circuits have approved front pay as a means of making plaintiffs whole for losses caused by discrimination. *See Thompson v. Sawyer*, 678 F.2d 257 (D.C.Cir.1982), *citing United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 932 (10th Cir. 1979).[1] The ordering of reinstatement in the form of admission to a partnership is also within a district court's remedial authority under Title VII. *See Hopkins*, 920 F.2d at 979, *citing Hishon v. King & Spaulding*, 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). Such equitable relief is consistent with the general goal of making the remedy "equal to the injury." *Albemarle Paper*, 422 U.S. at 418, 95 S.Ct. at 2372.

Additionally, the Supreme Court has instructed that a complete remedy "should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albemarle Paper*, 422 U.S. at 421, 95 S.Ct. at 2373. This instruction is particularly significant here since Wolf, Block now asserts that this court's finding of no constructive discharge operates to limit the scope of remedies available to Ms. Ezold, a standard which, if applied by this court, could deny her a complete remedy.

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1 *See also James v. Stockham Valves & Fitting Co.*, 559 F.2d 310, 358 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978); *Equal Employment Opportunity Comm'n v. Enterprise Association Steamfitters, Local 638*, 542 F.2d 579 (2d Cir. 1976), *cert. denied*, 430 U.S. 911, 97 S.Ct. 1186, 51 L.Ed.2d 588 (1977); *Patterson v. American Tobacco Co.*, 535 F.2d 257, 269 (4th Cir.), *cert. denied*, 429 U.S. 920, 97 S.Ct. 314, 50 L.Ed.2d 286 (1976).

II. *Constructive Discharge as a Limit to Title VII Relief*

Had Wolf, Block recommended Ms. Ezold for admittance to the Firm in the fall of 1988, her status as a partner would have been effective February 1, 1989 in accordance with Firm policy. Ms. Ezold remained employed as an associate at the Firm until her resignation June 7, 1989. Wolf, Block contends that the only remedy available to Ms. Ezold is back pay covering the four-month period between the date her unlawfully denied partnership would have become effective and the date of her resignation. As a basis for that argument Wolf, Block asserts that the circuit courts have been nearly unanimous in their application of the constructive discharge rule, whereby victorious Title VII plaintiffs who have left their employment with the defendant but who were not constructively discharged by the defendant are only entitled to a remedy covering the period during which the discrimination occurred up to the date of resignation. In response, the plaintiff asserts that other circuits have properly declined to apply the constructive discharge rule as harshly, deeming it to be relevant only to the question of mitigation.

The Third Circuit has held that a constructive discharge occurs when an employer "knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would would resign." *Goss v. Exxon Office Systems Company*, 747 F.2d 885 (1984). As the Third Circuit has yet to address the issue of how constructive discharge doctrine affects the scope of Title VII relief however, the rationales behind the application or non-application of the constructive discharge rule by the Circuits should be examined in light of the facts of this case. Analysis of the cases discussing this issue reveals that the rigid application of the constructive discharge rule to the plaintiff here would defeat the goals and purposes underlying Title VII.

Several circuits have applied the general rule that employees are entitled to awards such as back pay past the date of resignation and reinstatement only if they were actually or con-

structively discharged from their employment.[2] The rationale behind application of the rule has most often been that "society and the policies underlying Title VII will be best served if, wherever possible, unlawful discrimination is attacked within the context of existing employment relationships," a rationale first stated by the Fifth Circuit in *Bourque v. Powell Electrical Manufacturing Co.*, 617 F.2d 61 (1980). The Ninth Circuit expanded on that principle in *Thorne v. City of El Segundo*, 802 F.2d 1131 (1986), emphasizing that an employee "should not quit at the first sign of institutional discrimination." *Id.* at 1134. The *Thorne* court also stated that restricting backpay awards "encourages the employee to work with supervisors within the existing job setting and employment relationship in an effort to overcome resistance within that workplace and to eradicate the discrimination." *Id.*[3]

A simpler rationale behind the constructive discharge rule was enunciated in *Derr v. Gulf Oil Corp.*, 796 F.2d 340 (10th Cir. 1986). At trial the district court determined that though no constructive discharge took place, an employee had acted reasonably in quitting her job after being denied a promotion, and that therefore back pay would not be limited to the date of resignation. The Tenth Circuit overruled and applied the constructive discharge rule to limit back pay, stating that it was inconsistent for the trial court to have found that the employee acted reasonably in quitting where no constructive discharge had occurred. *Id.* at 343.

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2. *Jurgens v. Equal Employment Opportunity Commission*, 903 F.2d 386 (5th Cir. 1990); *Morrison v. Genuine Parts Co.*, 82 8 F.2d 708, n. 1 (11th Cir. 1987); *Maney v. Brinkley Municipal Waterworks and Sewer Department*, 802 F.2d 1073 (8th Cir. 1986); *Derr v. Gulf Oil Corporation*, 796 F.2d 340 (10th Cir. 1986); *Satterwhite v. Smith*, 744 F.2d 1380 (9th Cir. 1984); *Clark v. Marsh*, 665 F.2d 1168 (D.C.Cir. 1981).

3 The Ninth Circuit did not adopt the constructive discharge rule in *Thorne*, refusing to apply it to a Police Department employee who resigned from her clerk-typist position after the Department discriminatorily refused to hire her as a police officer. The court only recognized the "valid policy reason for limiting backpay awards in promotion cases." *Thorne*, 802 F.2d at 1134.

The Third Circuit has not taken a position on the issue of constructive discharge as a strict limit on Title VII relief, stating only that "[c]lassifying a termination as a constructive discharge rather than a voluntary quit has significant ramifications with respect to the scope of relief." *Goss*, 747 F.2d 885 (1984). Goss, a married woman, was a successful sales representative who became a victim of gender discrimination at the hands of her employer after she admitted to her supervisor that she intended to have both a family as well as a career. After repeated verbal abuse and intimidation questioning her ability to handle the dual responsibilities of a career and motherhood, Goss resigned her employment. The Third Circuit affirmed the district court's finding that a constructive discharge had occurred, holding that no specific intent on the part of the employer to bring about a discharge is required. Thus Goss was entitled to a remedy not only for the pre-discharge gender discrimination, but also for the wrongful termination of her employment. *Goss*, 747 F.2d at 889.

Where a plaintiff resigns after having been discriminatorily denied the one significant promotion available within the arena of his or her employment however, a more appropriate standard for determining the entitlement to relief past the date of resignation is one of reasonableness. In denial of promotion settings, the application of the constructive discharge rule is almost illogical because the employer is acting discriminatorily with the effect of keeping the plaintiff *in* his or her current position. Over and above the humiliation inflicted upon plaintiffs like Goss, a plaintiff who is discriminatorily denied a significant promotion, such as partnership in a professional firm, is burdened by the knowledge that she has been denied the job title and compensation commensurate with the success she has achieved in the performance of her work over the course of several years; were it not for her gender she would have been promoted to the significantly superior employment position she deserves.

Strict application of the constructive discharge rule in denial of promotion cases would mean that no matter how severe an employer's discrimination is with respect to the denial of a pro-

motion, an employee would be forced to remain in the inferior employment position so long as the employer does not permit the working conditions of the inferior employment position to become intolerable. If the employee instead resigns the inferior position, her entitlement to a remedy for the discriminatory denial of the superior position would cease at the date of resignation. Such a rule flouts the Supreme Court's instruction that a complete Title VII remedy "should only be denied for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for the injuries suffered through past discrimination." *Albemarle Paper*, 422 U.S. at 421, 95 S.Ct. at 2373.

Following *Goss*, the Third Circuit indicated in *Waddell v. Small Tube Products, Inc.*, 799 F.2d 69 (1986), that the equitable back pay remedy should not be denied when a plaintiff acts reasonably under the circumstances. In *Waddell*, an employee had delayed in pursuing his religious discrimination charge, leaving it dormant at the Equal Employment Opportunity Commission for some four-and-one-half years while he continued his employment with the defendant, Small Tube. The district court found that in light of the equitable nature of the backpay remedy, it would have been unjust for Small Tube to bear the financial responsibility for the delay period. The Third Circuit remanded the case to the district court for purposes of determining whether the employee's conduct had been excusable or not, instructing that "[t]he statutory purposes articulated in *Albemarle* would patently be frustrated by a reduction of backpay when the plaintiff"s delay was not found to be unreasonable." *Waddell*, 799 F.2d at 79.

This district has recognized that the efficacy of Title VII would be similarly diminished were its remedies to be reduced to merely back pay up to the date of resignation whenever no constructive discharge is found in denial of promotion cases. In *Helbling v. Unclaimed Salvage and Freight Co., Inc.*, 489 F.Supp. 956 (E.D.Pa. 1980), a female employee was denied promotion to store manager and resigned her employment. Finding that she had been discriminatorily denied the promo-

tion on the basis of her gender, the court rejected any notion that her back pay award should terminate on the date of her resignation. Referring to her reasons for leaving—disagreement with the male employee promoted instead—the court held that "[t]he back pay award, therefore, must be based on the period running from the date she should have been promoted to manager to the date the store closed—the period it can be assumed she would have held the job to which she was entitled." *Id.* at 963.

Other courts have similarly found the rigid application of the constructive discharge rule to be inconsistent with Title VII's remedial objectives. The Fourth Circuit, in *Wells v. North Carolina Board of Alcoholic Control*, 714 F.2d 340 (1983), held that back pay would appropriately extend to the date of judgment where the defendant employer's discriminatory denial of promotion was causally related to the plaintiff's resignation of employment. The court limited the constructive discharge issue to bear only on the issue of mitigation, i.e., the amount of the damages award.

In *Wells* the aggravation of the plaintiff's back injury occurred after his employer discriminatorily denied him a promotion which would have enabled him to avoid heavy lifting. Thus the plaintiff's subsequent resignation was said to have been causally related to the discriminatory denial of promotion. Wolf, Block attempts to distinguish *Wells* on the basis that the relationship between the employer's discriminatory action and the employee's resignation in *Wells* was much more direct than it is here. However the Fourth Circuit's treatment in *Wells* of the constructive discharge issue in the context of a Title VII case is most consistent with the "make whole" purposes of the statute, and is instructive here, where the plaintiff was not simply subjected to a one-time isolated discriminatory decision but instead endured a pattern of discriminatory treatment by Wolf, Block during her entire career at the Firm, culminating with the partnership denial. To require the causal relationship between an employer's illegal conduct and an employee's resignation to meet the standards imposed in constructive discharge cases in order for a Title VII plaintiff to be awarded relief past the date

of resignation would severely frustrate those same purposes by "limiting the remedy awarded to a plaintiff who has succeeded in establishing [a] defendant's unlawful conduct, and 'rewarding' prior illegal conduct by the same defendant." *Richardson v. Restaurant Marketing Associates, Inc.*, 527 F.Supp. 690 (N.D. Cal. 1981).[4]

Indeed even those circuits who have applied the constructive discharge rule in such a limiting fashion have not clearly defined the place occupied by the constructive discharge rule in the realm of Title VII. The Fifth Circuit's *Jurgens* opinion appears to express uneasiness with the ramifications of a strict constructive discharge rule limitation on Title VII relief, characterizing the rule as only part of the employee's duty to mitigate.[5] However that characterization of the constructive discharge rule, as merely a standard for reviewing a Title VII plaintiff's mitigative action, infringes somewhat on the Supreme Court's treatment of the mitigation duty in *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 231-2, 102 S.Ct. 3057, 3065-6, 73 L.Ed.2d 721 (1982), where the Court stated:

> An unemployed or underemployed claimant, like all other Title VII claimants, is subject to the statutory duty to minimize damages set out in § 706(g). This duty, rooted in an

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4 In *Richardson*, a restaurant employee who had decided to resign effective two days after she filed an employment discrimination complaint was fired the day she filed it. Upon being found to have engaged in unlawful discrimination, the restaurant argued that backpay should be limited to the two days between the firing and the date of intended resignation. The district court disagreed, reasoning that the restriction of relief past the date of resignation should only occur where an employee leaves her employment for reasons *unrelated* to the discrimination suffered. *See id.* at 696.

5 The Fifth Circuit's opinion in *Jurgens*, 903 F.2d at 389, states:

> We find no inconsistency in determining entitlement to such back pay, in some cases, by whether the employee properly mitigated damages after his retirement or resignation, and in other cases, involving denial of promotion, by whether the employee was constructively discharged. *We simply hold, as we did in* Bourque, *that where an employer discriminatorily denies promotion to an employee, that employee's duty to mitigate damages encompasses remaining on the job.* (emphasis added).

> ancient principle of law, requires the claimant to use reasonable diligence in finding other suitable employment. Although the unemployed or underemployed claimant need not go into another line of work . . . or take a demeaning position, he forfeits his right to backpay if he refuses a job substantially equivalent to the one he was denied.

In footnote 4 to its *Jurgens* opinion, the Fifth Circuit interprets that mitigation standard as applicable only to those employees no longer maintaining an employment relationship with the defendant employer. According to the Fifth Circuit then, those employees who are victims of unlawful discrimination but who have not been fired, must remain on the job or else forfeit the right to an award of damages past the date of resignation if no constructive discharge occurs.

In light of above-discussed decisions, and in light of the wide variation among the facts of any given Title VII case, the constructive discharge doctrine should not operate within the context of Title VII as the severe limitation on Title VII relief advocated by Wolf, Block. From the extreme harshness of a discriminatory firing or the denial of a long-awaited career-making promotion, through the demoralizing stagnation of a discriminatory demotion, to the more subtle discrimination contained in subjection to different working conditions, Title VII encompasses a great range of unlawful behavior by employers in their relationships with employees.

"In tailoring a Title VII remedy a court 'has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' " *Ford Motor Co.*, 458 U.S. 219, 233, n. 20, 102 S.Ct. 3057, 3066, n. 20, 73 L.Ed.2d 721 (quoting *Albemarle Paper Co.*, 422 U.S. at 418, 95 S.Ct. at 2372). Wholesale application of the constructive discharge rule prevents fulfillment of that responsibility. The elimination of the availability of relief past the date of a Title VII plaintiff's resignation would conflict with the remedial duty specified above in that the plaintiff could neither be compensated for his or her injury, nor would a defendant be deterred from further

discrimination. In addition such a restriction would discourage a plaintiff from mitigating damages by accepting a position at another employer where he or she would be permitted to advance without discrimination. *Harrison v. Dole*, 643 F.Supp. 794 (D.D.C. 1986).[6]

III. *Application of the Constructive Discharge Rule to Eliminate Relief Beyond the Date of Ms. Ezold's Resignation*

The application of the constructive discharge rule here, where the plaintiff was discriminatorily denied the one significant promotion available to an attorney practicing in a private firm setting, would be contrary to the most basic principles of equity underlying Title VII. Not only would a complete remedy be withheld from the plaintiff, but she would also be robbed of the freedom, once her promotion was denied, to seek out, both as a mitigative measure as well as for personal/professional advancement, employment opportunities that approach the position which the plaintiff was discriminatorily denied and that are superior to the position which the employer discriminatorily forced the plaintiff to remain.

Having practiced law for approximately eight years, the plaintiff had completed her fifth year as a litigation associate at the defendant Firm when she became eligible for partnership consideration in the fall of 1988. For an attorney practicing in a private firm, "coming up for partner" is what an associate strives for in the years preceding. Unlike the structure in many businesses, corporations, and government organizations, where often there exist many step-by-step, small scale promotions, the partnership decision is often a make-or-break event for an associate who has persevered long enough to be considered for admittance to the partnership. In denying Ms. Ezold that partnership,

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6 In *Harrison*, several black women employees of the United States Maritime Administration resigned after being denied promotions on the basis of their race. The district court permitted back pay past the date of resignation as well as reinstatement, stating that the restriction of Title VII relief past the date of resignation is "supported neither by the cases cited in [the defendant's] brief, nor by reason." *Id.* at 796.

Wolf, Block was not withholding an incremental benefit from the plaintiff. Instead the defendant Firm had denied Ms. Ezold what is by far the single most significant promotion achievable in the arena of private law firms, and it had done so, at least in part, on the basis of her gender.

Wolf, Block asserts that the constructive discharge rule should limit Ms. Ezold's relief to back pay covering the period between the date her partnership would have become effective (February 1, 1989) and the date she resigned (June 7, 1989), a period of just over four months. The cases cited by Wolf, Block for that argument[7] premise the rule's application upon the desire to encourage employees to stay at the place of employment in order to give the employer a chance to remedy the discrimination; an employee should not quit at the first sign of discrimination. In *Thorne, supra*, the Ninth Circuit supplied an important qualification to that policy however:

> "Where, as here, an employee has no such opportunity [to overcome resistance in that workplace and to eradicate discrimination there], then these incentives have no relevance and back pay restrictions are inapplicable."

802 F.2d at 1134. Indeed, "the policy of encouraging solutions within the context of the working relationship makes sense only when a possible solution exists." *Nobler v. Beth Israel Medical Center*, 715 F.Supp. 570, 572 (S.D.N.Y. 1989). Where such a possibility can no longer be said to exist, back pay should not be restricted where the motivation for resignation is the very discrimination suffered and not some unrelated reason, even where no constructive discharge took place. *Id.* at 572-3. Wolf, Block attempts to distinguish *Nobler* on the grounds that in *Nobler* there was no opportunity for the plaintiff to solve the problem of discrimination from within because the plaintiff was denied a position for which only one space existed, whereas space in the Firm's Partnership is not so limited. This stance conflicts with evidence presented at trial that in the eyes of Wolf, Block, it was unlikely that Ms. Ezold would ever become a partner.

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7 *See* note 2, *supra*.

More than many employees would, Ms. Ezold can be said to have followed the directions of those circuits who would instruct her to battle the discrimination from within. She can hardly be accused of quitting at the first sign of discrimination. Having been told at the start that as a female it would be more difficult for her at Wolf, Block, Ms. Ezold nonetheless embarked on a career at Wolf, Block as a litigation associate. In spite of receiving admittedly inferior work assignments and a less than normal exposure to Wolf, Block's partners, she proceeded to build a reputation as a dependable, talented lawyer, resourceful in the courtroom and popular with the clients on whose matters she worked. But whereas those previous signs of discrimination had been theretofore surmountable in that they did not prevent her from achieving the successes that merited admittance to the Partnership, Wolf, Block's denial of partnership to Ms. Ezold in the fall of 1988 was a blow she could not sit back and endure with the same willingness to return to the grindstone as she had for the previous five years. Eight months after being informed of the partnership denial, Ms. Ezold resigned in order to accept a position as president of one of Wolf, Block's clients.

Wolf, Block has maintained that it wanted Ms. Ezold to stay with the Firm. One partner, a member of the Firm's Executive Committee (which is responsible for making the final partnership recommendation to the entire Partnership for vote) indicated to Ms. Ezold that she could become a partner in charge of the Domestic Relations Department if she would remain another year as an associate, yet refused to grant her an annual salary increase typically granted to associates. It is reasonable to conclude that in light of the evidence presented, the opportunity for Ms. Ezold to overcome and eradicate the discrimination she had suffered by remaining at the Firm had finally been foreclosed.

That Ms. Ezold chose to leave Wolf, Block in an attempt to replenish and continue her career was not a knee-jerk reaction to a one-time discriminatory act by Wolf, Block. As it is for any senior associate in large law firm, the partnership decision regarding Ms. Ezold was a culmination of her entire career

theretofore at the firm, most likely encompassing 10,000 or more hours billed on Wolf, Block client matters. In Ms. Ezold's case however, the adverse partnership decision also represented a culmination of the numerous elements of discriminatory treatment she had received throughout her years at the Firm. When Wolf, Block unlawfully permitted gender to enter into its consideration of Ms. Ezold for partner, she understandably came to the conclusion that her career at the Firm would be limited to a much greater extent than she could reasonably accept.

The statutory purposes of Title VII enunciated in *Albemarle Paper*, 422 U.S. at 421, 95 S.Ct. at 2373, would be severely frustrated were Ms. Ezold's back pay to be limited strictly to the four-month period between the date on which the adverse partnership decision took effect and the date of her resignation, when her conduct in leaving the firm was not unreasonable. Application of the constructive discharge rule here would give employers a free hand to engage in a careful campaign of subtle discrimination against an employee—such as inferior work assignments, etc.—which so long as it does not rise to the level of making working conditions intolerable, would not make the employer responsible for its unlawful actions past the date at which the victimized employee surrenders by resigning.

Although Wolf, Block argues that to refrain from applying the constructive discharge rule here would render that doctrine meaningless, to apply it rotely to the plaintiff, an attorney who was subjected to a pattern of discriminatory treatment by her employer over a five-year period, punctuated by a denial of partnership, would be inconsistent with even the plainest view of the purposes of Title VII. Title VII is no less empowered to eradicate those discriminatory acts which are subtly disguised and carefully implemented as it is with respect to those acts of blatant discrimination which make working conditions intolerable; it was enacted to eradicate any unlawful discrimination and to make employees whole for the injuries they have suffered as a result of their employers' consideration of certain discriminatory elements, such as gender, in the context of the employer-employee relationship.

Constructive discharge doctrine meanwhile, developed under the National Labor Relations Act, has also taken an important place in the context of employer-employee relations, enabling the courts to go beyond the simple query as to whether the employee was "fired" and to scrutinize more equitably an employee's decision to leave his or her employment. The two doctrines— Title VII and constructive discharge—are born of different necessity and each holds a defendant to a different standard for purposes of determining liability. As constructive discharge doctrine addresses only the "tolerability" of the conditions in which an employee must work, be they motivated by lawful or unlawful considerations, Title VII's scrutiny includes the lawfulness of the bases upon which an employer sets those conditions. Such a distinction suggests that constructive discharge doctrine is not a perfect measure of the severity of a Title VII claim for purposes of determining the appropriate scope of relief, just as the application of a different standard of liability for each doctrine suggests that one is not a perfect barometer of the legal merit of the other.

The constructive discharge inquiry as to the tolerability of Ms. Ezold's working conditions at Wolf, Block is not rendered meaningless by an inquiry as to whether her decision to resign was reasonable under the circumstances for purposes of determining the appropriate Title VII relief for the period after her resignation. The constructive discharge inquiry may be informative for purposes of determining whether Ms. Ezold properly mitigated her damages, but it is not appropriately applied as a strict limitation on the scope of Title VII relief available to her here. An appropriate order follows.

ORDER

AND NOW, this 15th day of March, 1991, in consideration of the memoranda of law submitted by the plaintiff, Nancy O'Mara Ezold, and the defendant, Wolf, Block, Schorr and Solis-Cohen, as well as the replies thereto, on the matter of the available scope of relief under Title VII in light of this court's prior finding upon trial that the defendant had violated Title

VII by considering the plaintiff's gender in its decision to deny her partnership, it is ORDERED that trial upon the matter of damages should proceed with respect to the following issues:

(1) back pay;

(2) the instatement of the plaintiff, Nancy O'Mara Ezold as a Partner within the defendant Firm, Wolf, Block, Schorr and Solis-Cohen, or in the alternative, front pay;

and (3) proper mitigation of damages by the plaintiff.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

NO. 90-0002

JULY 23, 1991

EZOLD,

—v.—

WOLF, BLOCK, SCHORR, AND SOLIS-COHEN:

JAMES M. KELLY, *District Judge*:

On November 29, 1990, this court found that the defendant law firm had considered the Plaintiff's gender in its decision not to promote her to partnership, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"). Plaintiff's claim of constructive discharge under Title VII was denied. On March, 15, 1991, this court determined that Plaintiff's failure to prove constructive discharge would not restrict Plaintiff's remedies for the gender discrimination beyond the date of her resignation from the firm.

Presently before the court are the parties' memoranda of law addressing the issue of whether Plaintiff properly mitigated her damages. For the reasons stated more fully below, this court finds that Plaintiff properly complied with her statutory duty to mitigate damages imposed by section 706(g) of Title VII.

The facts of this case which are relevant to the present issue are as follows. In the [sic] October 1988, the defendant firm informed Plaintiff, then in her sixth year as an associate in the firm's litigation department, that she would not be promoted to partner, which partnership would have been effective February 1, 1989. At trial, Plaintiff proved that her gender played a part in the defendant firm's decision not to promote her to partner. In November, 1988, the chairman of the firm's executive com-

mittee, Mr. Charles Kopp, offered Plaintiff partnership in the firm's domestic relations department if she would remain as an associate for another year. Plaintiff was also informed that she would not receive the semi-annual raise customarily accorded to associates at that time, however she would receive a raise in July, 1989. Plaintiff then decided not to accept the offer represented by Mr. Kopp.

Plaintiff remained at the firm until June 7, 1989, upon which date she resigned her association with the defendant. At the time of her resignation, Plaintiff was receiving an annual salary of $73,000. Prior to resigning, Plaintiff had secured a one year contract as president and chief counsel of BES Environmental Specialists ("BES"), an environmental consulting company. Plaintiff's total compensation under her one-year contract with BES was $93,000, including a $20,000 bonus. Upon the expiration of Plaintiff's one-year contract with BES, Plaintiff secured employment with the firm of Rosenthal and Ganister, where she currently earns an annual salary of $60,000.

Plaintiff now asserts that the above facts establish that she acted reasonably to mitigate her damages by rejecting the offer of domestic relations partnership in one year represented to her by the chairman of the firm's executive committee, and leaving her employment as an associate at the defendant firm. Plaintiff argues that this court's March 15, 1991 determination that her Title VII relief would not be restricted past the date of her resignation even though no constructive discharge occurred effectively resolves the mitigation issue because it was determined that Plaintiff acted reasonably in resigning her employment at the defendant firm. Plaintiff further argues that she had no duty to accept the offer of a domestic relations partnership in one year as that position was not equivalent to the litigation partnership that she was discriminatorily denied.

In response, the defendant submits that Plaintiff's statutory duty to mitigate, and relevant caselaw interpreting that duty, require that she should have remained in her employment at the defendant firm, and accepted the offer of a domestic relations partnership in one year's time. Defendant argues that Plaintiff's acceptance of the one-year contract with BES was a temporary

position which only allowed her to earn more than she would have at the defendant firm for the $7^1/_2$ months between mid-June, 1989 and February 1, 1990, when her domestic relations partnership would have been effective. In support of that position, the defendant notes that since her contract with BES expired, Plaintiff has been earning less than she had been when she left the defendant firm, and less than half of what she would have received had she accepted the domestic relations partnership offer.

Section 706(g) of Title VII establishes that backpay awarded to a victim of unlawful discriminatory employment practices is to be reduced as follows:

> . . . . Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the backpay otherwise allowable.

Under Section 706(g) then, the amount of backpay a discriminatory employer is required to pay a victorious Title VII plaintiff is to be offset and reduced by whatever the plaintiff earned in the interim period between the discriminatory action and the judgment. If it is determined that the plaintiff did not exercise reasonable diligence in securing interim employment, a determination of what amounts were earnable with reasonable diligence is to be made, and the backpay award is to be reduced by that amount.

In *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219 [29 FEP Cases 121] (1982), the Supreme Court examined the Title VII mitigation duty in the context of an employer's discriminatory refusal to hire and subsequent offer of the job previously denied, which offer did not provide seniority retroactive to the date of the discriminatory refusal. The Court held that "absent special circumstances, the rejection of an employer's unconditional job offer ends the accrual of potential backpay liability." *Id.* at 241. In so holding, the Court stated the following in reference to the duty of all Title VII claimants to mitigate damages:

> This duty, rooted in an ancient principle of law, requires the claimant to use reasonable diligence in finding other suitable employment. Although the unemployed or underemployed claimant need not go into another line of work, accept a demotion or take a demeaning position, he forfeits his right to backpay if he refuses a job substantially equivalent to the one he was denied. Consequently, an employer charged with unlawful discrimination often can toll the accrual of backpay liability by *unconditionally offering* the claimant the job he sought, and thereby offering him an opportunity to minimize damages.

Ford Motor Co., supra, 458 U.S. at 231–32 (emphasis added).

Plaintiff's refusal of the domestic relations partnership offer was not per se violative of her statutory duty to mitigate because the offer was conditioned upon her remaining an associate for an additional year, and required her to forfeit one of the two semi-annual raises customarily accorded to associates by the defendant firm. In addition, although the delayed partnership offer had been extended by the firm's executive committee chairman, Plaintiff had no guarantee that in one year's time she would definitely receive the necessary approving vote from the firm's full voting partnership, which vote is required to make partner.[1]

All of the circumstances surrounding the offer must be considered in determining whether Plaintiff's rejection of it was unreasonable.[2] In light of the above facts, Plaintiff acted with reasonable diligence in obtaining alternative employment, albeit guaranteed for only one year, at an annual rate of compensation $20,000 greater than the associate's salary she commanded at the time she left the defendant firm. In *Huegel, supra, n. 1*, the Postal Service denied the plaintiff employment and thereafter offered the plaintiff the "next available position." Huegel, 683 F.Supp. at 124–26. The court noted that the "next

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1 See Finding of Fact #13, Memorandum accompanying Nov. 27, 1990 Order, p. 3.

2 *See Huegel v. Tisch*, 683 F.Supp. 123, 126 [49 FEP Cases 742] (W.D. Pa. 1987), *citing Blomstrom v. Bethlehem Steel Corp.*, No. 87-1472 slip op. at 3 [47 FEP Cases 1261] (E.D. Pa. Nov. 19, 1987) [available on WESTLAW, 1987 WL 20235].

available position *might not have been available for a year*," *Id.* at 127 (emphasis added) as a basis for refusing to restrict backpay after the date of the plaintiff's refusal of the offer.

Defendant argues further that this court's trial finding of no constructive discharge is rendered legally meaningless by the conclusion that Plaintiff's resignation neither bars post-resignation relief, nor violates the statutory duty of mitigation. Defendant's argument overlooks at least two relevant aspects of the constructive discharge ruling however.

First, the litigation of constructive discharge claims in Title VII cases is not merely for the purpose of determining applicable limits on relief, but for determining actual liability. A Title VII plaintiff who is denied a promotion, as was Plaintiff here, can seek Title VII relief on alternative grounds, i.e. that either the employer unlawfully discriminated in the refusal to promote, or that the employer unlawfully discriminated against the plaintiff such that he or she was forced to quit the job in which he or she remained. In cases where there is no denial of promotion issue, the plaintiff claiming to have merely been discriminatorily forced out of his or her job, constructive discharge is the sole means of determining liability. Here a denial of promotion was at issue, hence Plaintiff sought relief on alternative grounds.

A second aspect of the constructive discharge finding's relevance to the present issue involves the determination of the scope of "reasonable diligence." This court's March 15, 1991 holding that Plaintiff's Title VII relief would not be cut off at the date of her resignation merely effected this court's determination that the application of a general ruling eliminating Title VII relief after the date of resignation from a lesser job when a superior position has been discriminatorily denied would not be consistent with the equitable purposes of Title VII in view of the facts of this case. That Plaintiff's relief would not be restricted to the period prior to her resignation does not absolve Plaintiff of her duty to mitigate damages however.

In the context of the mitigation issue the trial finding of no constructive discharge is thus relevant in determining whether Plaintiff acted with reasonable diligence in giving up her associate position and accepting the one-year contract as president

and general counsel for BES. Here, the "reasonable diligence" of Plaintiff's actions is not to be considered in light of any equitable duty to battle the discrimination from within, etc., as was relevant to the analysis underlying this court's March 15, 1991 holding, but instead simply in terms of whether the dollar amounts earnable are such that she should have continued in that position. The relevance of the constructive discharge finding is thus made apparent: As Plaintiff was not constructively discharged from her associate position, the $73,000 she was earning in it is not eliminated from the scope of possible mitigative efforts, and this court must consider whether proper mitigation of the damages suffered as a result of being denied partnership encompassed remaining in the associate position.

Considering all of the facts and circumstances surrounding the original denial of a partnership, the subsequent offer of a domestic relations partnership in one year, and Plaintiff's decision to leave the defendant firm for alternative employment, Plaintiff acted with reasonable diligence in accepting the one-year contract with BES, satisfying her statutory duty to mitigate damages under Title VII. At the time of her decision to accept BES's offer, Plaintiff was assured of earning $20,000 more with BES during that year than she would have as an associate with the defendant. Plaintiff reasonably could have anticipated that as president and general counsel for BES, there was a significant possibility of future earnings at or above that level. Thus Plaintiff was not required to accept the domestic relations partnership offer and/or remain in her position as an associate at the defendant firm in order to satisfactorily mitigate her damages.

As Plaintiff and Defendant have each submitted an alternative proposed order detailing in specific dollar amounts the backpay award appropriate to a determination that Plaintiff either did or did not properly mitigate damages, respectively, I will adopt Plaintiff's version in light of my conclusion today. That appropriate order follows.

Order

AND NOW, this 23rd day of July, 1991, for the reasons set forth in the foregoing Memorandum, it is ORDERED that:

A. An Amended Memorandum having been rendered by the Court on November 29, 1990 in favor of Plaintiff on her claim of sex discrimination in promotion to partnership in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (Title VII) and against Plaintiff on her claim of construction [sic] discharge in violation of Title VII;

B. A Memorandum and Order having been rendered by the court on March 15, 1991 that trial should proceed with respect to the issues of backpay, instatement or, in the alternative, front pay, and mitigation of damages by Plaintiff;

C. The Court having been advised that Plaintiff seeks the remedy of instatement as a partner with defendants and that defendant does not oppose the remedy of instatement should the Court's November 29, 1990 and March 15, 1991 Orders be affirmed on appeal;

D. The Court having been advised that the parties have agreed to the amount of back pay; and

E. The Court having been advised that the parties' agreements set forth in paragraph (D) and (E) above are subject to the rights of the parties to appellate review of the Court's prior Orders and this Judgment;

Pursuant to the Court's prior Orders and the agreements of the parties set forth above, it is FURTHER ORDERED AND ADJUDGED that:

I. INSTATEMENT

A. In the event the Court's November 29, 1990 and March 15, 1991 Orders and this Judgment of instatement are affirmed in relevant part, Plaintiff shall be instated as a partner at defendant in its Litigation Department with the full rights and duties of all such individuals admitted to partnership by defendant

effective February 1, 1989, such instatement to occur within 30 days of such affirmance and the exhaustion of all appeals or the expiration of all time periods for seeking appellant review.

B. Neither party waives its rights to seek modification by this Court, including its rights to seek any otherwise permissible discovery in connection with any such requested modification, of this Judgment ordering instatement. Such a request for modification may be based only upon subsequent events occurring during the period following entry of this Judgment and ending upon the later of the exhaustion of all appeals or the expiration of all time periods for seeking appellate review. If the Court determines that modification of this Judgment of instatement is appropriate, the Court shall conduct such additional procedures as may be necessary to determine the appropriate relief to which Plaintiff may be entitled.

II. BACK PAY

A. Plaintiff shall be awarded back pay in the amount of $131,784 for the period from the date of her resignation through January 31, 1991. Of this sum, $90,516 is to be paid to Plaintiff, with full pre-judgment interest to be calculated on a monthly, cash-flow basis. If and when Plaintiff is instated as a partner, the remaining sum of $41,268 shall be deemed to have been contributed by Plaintiff to Defendant's capital and shall be maintained by Defendant with respect to Plaintiff in the same manner and under the same rules as are applicable to the capital contributions of those individuals admitted to partnership in February, 1989.

B. If this Court's prior Orders and this Judgment are affirmed in relevant part, this Court shall thereafter determine back pay for the period from February 1, 1991 to the date of Plaintiff's instatement as a partner, with full pre-judgment interest to be calculated on a monthly, cash-flow basis for the period prior to the entry of this Judgment and post-judgment interest thereafter.

III. ATTORNEYS' FEES AND COSTS

The Court finds further that Plaintiff is a prevailing party within the meaning of Title VII and therefore is entitled to attorneys' fees and costs. The Court will determine the amount of Plaintiff's attorneys' fees and costs if and when a judgment in Plaintiff's favor is affirmed and after the exhaustion of all appeals or the expiration of all time periods for seeking appellate review.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 91-1741 & 91-1780

Filed February 3, 1993

NANCY O'MARA EZOLD,

Appellant at No. 91-1780,

—v.—

WOLF, BLOCK, SCHORR AND SOLIS-COHEN,

Appellant at No. 91-1741.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Docket No. 90-00002)

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS and SEITZ*, *Circuit Judges*.

The petitioner for rehearing filed by Nancy O'Mara Ezold in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the

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* Hon. Collins J. Seitz, Senior Circuit Judge of the United States Court of Appeals for the Third Circuit, was limited to voting for panel rehearing.

other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ WILLIAM D. HUTCHINSON
Circuit Judge

DATED: February 3, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 90-0002

Filed March 13, 1993

NANCY O'MARA EZOLD,

—v.—

WOLF, BLOCK, SCHORR AND SOLIS-COHEN

ORDER

AND NOW, this 3rd day of March, 1993, in consideration of the Opinion and Order of the United States Court of Appeals for the Third Circuit filed December 30, 1992, judgment is ENTERED in favor defendant, Wolf, Block, Schorr, and Solis-Cohen, and against plaintiff, Nancy O'Mara Ezold.

BY THE COURT,

/s/ JAMES MCGIRR KELLY
James McGirr Kelly, *J.*

Entered: March 4, 1993
Clerk of Court

Proposed Findings of Fact Submitted by Wolf, Block, Schorr and Solis-Cohen

[277a] 76. Ms. Ezold admitted that she was not the subject of any sexual harassment while she was employed by Wolf, Block. (Ezold, Day 13, p. 55).

77. Mr. Kurland was not a member of either the Associates Committee or the Executive Committee during the time that Ms. Ezold worked at Wolf, Block. Mr. Kurland left Wolf, Block to become Philadelphia's City Solicitor in January, 1988, many months before the Associates Committee and Executive Committee decided not to recommend Ms. Ezold for admission to the partnership. (Kurland, Day 9, pp. 19, 87).

78. The alleged remarks by Mr. Kurland about which Ms. Ezold has testified do not demonstrate that Mr. Kurland discriminated against her on account of her gender. Also, none of the other alleged statements and actions by various other partners about which Ms. Ezold testified at trial demonstrate that Ms. Ezold was discriminated against on account of her gender.

IX. None of Ms. Ezold's Evaluations Was Based Upon or Influenced By Her Gender

79. The written evaluation documents relating to Ms. Ezold's job performance reflect criticisms of and concern over her intellectual and legal analytical ability by various partners beginning shortly after she started working at Wolf, Block and continuing throughout her employment there. (*See e.g.*, Def. Ex. No. 80 at Bates Nos. 002657-58; 002935-36; 002822-23; 003174-77; Def. Ex. Nos. 47, 48, 271, 273, 274, 275, 280, 281, 295, 296, 301, 302, 303, 305, 306, 308, 333, 336).

[278a] 80. By 1985, there were growing concerns over Ms. Ezold's abilities and progress at the Firm, particularly with respect to her legal analytical ability and ability to analyze complex legal issues, and these concerns were repeatedly expressed to Ms. Ezold during her evaluation meetings. As reflected in Mr. Boote's contemporaneous memorandum, Ms. Ezold was told in her March 4, 1985 evaluation meeting with Mr. Kurland and Mr. Boote that her evaluations were "trou-

blesome" inasmuch as she had not yet demonstrated the ability "to deal with complicated legal issues, perform research and write significant briefs". (Ezold, Day 2, pp. 46, 49; Day 4, p. 119); (Def. Ex. No. 47); (Boote, Day 9, pp. 122-126); (Kurland, Day 9, pp. 36-37); (Def. Ex. No. 271).

81. During the March, 1985 evaluation meeting, Mr. Kurland told Ms. Ezold that an effort would be made to have her work with a number of different partners in the Litigation Department. (Kurland, Day 8, pp. 33-37); (Def. Ex. No. 47).

82. Pursuant to the foregoing commitment, Ms. Ezold was assigned to work with a number of different partners in the Litigation Department subsequent to the March, 1985 evaluation meeting. However, her evaluations continued to reflect significant concerns on the part of various Litigation Department partners with respect to her ability to perform complex legal analysis, research and writing. (Arbittier evaluation dated June 19, 1985, Def. Ex. No. 301); (Schwartz evaluation dated July 1, 1985, Def. Ex. No. 280); (Arbittier, [**279a**] Boote, Fiebach, Joseph and Simon evaluations for evaluation period of April, 1985–October 31, 1985, Def. Ex. No. 80 at pp. 2792-5; 2822-3; 2826-7; 2838-9); (Kurland, Arbittier, Schwartz, Fiebach evaluations for evaluation period of November, 1985–April, 1986, Def. Ex. No. 80 at pp. 2593-4, 2643-4, 2657-8, 2677-8, 2749-50); (Def. Ex. No. 303).

83. By early 1986, the Associates Committee had determined, based on Ms. Ezold's evaluations, that her legal analytical ability was not up to Wolf, Block's normal standards and therefore she was not "on track" for regular partnership. (Def. Ex. No. 303); (Boote, Day 9, pp. 135-136); (Strogatz, Day 11, pp. 4-5).

84. Mr. Boote's February 5, 1986 memorandum reflects his conclusion that "Nancy has not demonstrated an ability to research or write creatively and effectively. She lacks analytical ability . . . Nancy is not going to make it on the regular track toward partnership . . ." (Def. Ex. No. 303); (Boote, Day 9, pp. 134-135); (Strogatz, Day 11, pp. 4-5).

85. Mr. Boote's conclusions with respect to Ms. Ezold's legal analytical ability were discussed at the Associates Committee's February, 1986 meeting. A consensus was reached by the Committee at that meeting that Ms. Ezold was not "on track" for partnership because her legal analytical ability was below the level which the Firm consistently required for admission to the partnership. As set forth in Mr. Boote's contemporaneous memorandum concerning the evaluation he and [**280a**] Mr. Kurland gave to Ms. Ezold on February 24, 1986, she was apprised of the following conclusions of the Committee:

> Nancy appeared to accept the judgment, albeit a little grudgingly, that her analytical, research and writing ability was not up to our standards. . . We made it very clear to Nancy that if she pursues general civil litigation work she is not on track toward partnership. . . .

(Def. Ex. No. 48); (Ezold, Day 4, pp. 120, 128); (Boote, Day 9, pp. 136-139); (Kurland, Day 8, pp. 40-44).

86. Mr. Boote reported to the Associates Committee in his June 26, 1986 memorandum that "[h]er minuses are that there is doubt about her analytic and writing ability" and "[i]n her last review, Nancy was informed that there was great doubt about whether she could become a partner here in the regular course". (Def. Ex. No. 306) (Boote, Day 9, pp. 140-142).

87. In her October 1, 1986 evaluation meeting with Mr. Kurland and Mr. Schwartz, Ms. Ezold was once again told that a number of partners had serious reservations concerning her legal analytical ability and that it was unlikely she would become a partner at Wolf, Block. As set forth in Mr. Schwartz' contemporaneous memorandum concerning this evaluation meeting, Ms. Ezold was told as follows:

> [Sy] told her that other lawyers had strong negative sentiments about her capabilities and they feel she has a number of shortcomings in the way of complicated analysis of legal problems and in being able to handle the big com-

plicated corporate litigation, and therefore does not meet the standard for partnership at Wolf, Block.

* * *

[281a] Both Sy and I urged Nancy to seriously consider looking for employment elsewhere as she may not be able to turn the tide.

(Def. Ex. No. 49); (Schwartz, Day 8, pp. 55-59); (Ezold, Day 4, pp. 127-8); (Kurland, Day 9, pp. 47-49); (Boote, Day 9, p. 144).

88. Ms. Ezold admitted that during her 1987 annual "senior" associate evaluation meeting, she was told that various partners "criticized my writing ability and questioned my ability to handle complex litigation" and also "criticized or questioned my ability in the area of legal analysis". (Ezold, Day 2, p. 72). At that meeting, she received a "Partnership Potential" form which stated that the Associates Committee then viewed her prospects of attaining "regular" entry-level partnership the following year as "unclear". (Def. Ex. No. 50); (Ezold, Day 2, pp. 46-47); (Strogatz, Day 11, pp. 23-25).

X. The Decision By the Associates Committee Not to Recommend Ms. Ezold For Regular Partnership Was Not Based Upon Her Gender

89. Pursuant to the "5 year rule" generally applicable to lateral associates, Ms. Ezold and the other members of the class of 1981 were first eligible to be admitted to the partnership effective February 1, 1989. (Def. Ex. No. 18); (Ezold, Day 1, p. 35); (Strogatz, Day 10, pp. 199-200).

90. There were eight associates who were first eligible for admission to the partnership effective February 1, 1989: Ms. Ezold, Roma Young, Andrew Chirls, David Gitlin, John [282a] Schapiro, Robert Silverman, Alan Singer, and James Wiles. (Def. Ex. No. 18).

91. The Associates Committee met in September, 1988 to consider which of the foregoing associates would be recommended by it to the Executive Committee for admission to the partnership effective February 1, 1989. (Strogatz, Day 11, p. 76).

92. In making its decision as to whether or not it would recommend Ms. Ezold for partnership, the Associates Committee took into consideration the views expressed by all of the Firm's partners, including those partners who supported Ms. Ezold for partnership. However, a number of these supporters had acknowledged, either explicitly or implicitly by their actions, that they believed that Ms. Ezold was deficient in her legal analytical ability. (Schwartz, Day 8, pp. 46, 68); (Boote, Day 9, pp. 146-147); (Davis, Day 8, pp. 129, 140).

93. Despite the fact that certain of Ms. Ezold's supporters believed that she did not have the level of legal analytical ability which Wolf, Block had consistently required of all of its associates being considered for partnership, they advocated relaxation of this partnership standard in order to admit Ms. Ezold to the partnership standard in order to admit Ms. Ezold to the partnership. Mr. Davis stated that the traditional Wolf, Block partnership admission standard "was always applied across the board to males and females" and "had not been lessened for males." (Davis, Day 8, pp. 148-151); (Boote, Day 9, pp. 146-147); (Kurland, Day 9, pp. 50-51).

[283a] 94. Although Mr. Davis supported Ms. Ezold for partnership, his 1988 evaluation of her stated several different times that "She will never be a legal scholar", and he noted this criticism in response to the section of the evaluation form which requests the evaluator to describe "any particular weaknesses" in the associate. (Def. Ex. No. 291). Indeed, Mr. Davis' lowest grades of her were in the areas of "legal analysis" and "creativity". (Def. Ex.No. 291). He testified that Ms. Ezold "was not up to par on her legal analytical ability" and "I wouldn't turn over to her matters which involved complex legal theories, creative lawyering in the sense of legal matters and

certainly not things which involved a lot of heavy brief writing". (Davis, Day 8, pp. 129, 140).

95. Despite the fact that Ms. Ezold had been assigned to assist Mr. Davis in the *Home Unity* litigation, he assigned a first year associate, not Ms. Ezold, to prepare a complicated brief challenging a Department of Banking decision because "she would not, in my view, have the legal creativity or imagination or writing ability or research ability to produce that kind of brief." (Davis, Day 8, pp. 135-136). Moreover, in a different case Mr. Davis criticized Ms. Ezold for failing to adequately research and analyze in a Third Circuit brief an issue arising under the Uniform Commercial Code, and he told her that her analysis "was unacceptable." He later conveyed that criticism of Ms. Ezold to the Chairman of the Associates Committee. (Davis, Day 8, pp. 122-124); (Strogatz, Day 11, pp. 30-32).

[**284a**] 96. Similarly, although Mr. Schwartz supported Ms. Ezold for partnership, his evaluations of her over the years had consistently reflected his belief that legal analysis was her weakest area. (Def. Ex. Nos. 280, 281, 282); (Schwartz, Day 8, pp. 45–59; 63–64, 69). For instance, his 1985 evaluation stated, *inter alia*, that "I'm often left with a product that demonstrates uncertainty in the analysis of a problem. . . sometimes I get the sense that Nancy feels adrift and is just marching as best she can to my analytical tune." (Def. Ex. No. 280). His 1986 evaluation noted that her analytical ability was her "weakest" aspect, and indeed Mr. Schwartz' lowest grades of her in both his 1985 and 1986 evaluations were in the areas of "legal analysis" and "writing ability." (Def. Ex. Nos. 280, 281); (Ezold, Day 4, p. 132). Mr. Schwartz criticized Ms. Ezold's "analysis of complex legal issues" once again in his 1987 evaluation in response to the section of the evaluation form requesting a description of the associate's weaknesses, and he supplemented that evaluation with an oral interview with members of the Associates Committee during which he again reported that deficiency. (Def. Ex. No. 282); (Schwartz, Day 8, pp. 63-64); (Strogatz, Day 11, pp. 18-19). Also, although Ms. Ezold had

been working for Mr. Schwartz on the *Jesko* case, he asked Mr. Arbittier to assign Mr. Matusky (an associate with less seniority than Ms. Ezold) to assist him in a project analyzing the new sentencing and parole guidelines, rather than Ms. Ezold, because he "wanted to be absolutely certain that it was done [285a] correctly the first time." (Schwartz, Day 8, pp. 60-61); (Arbittier, Day 7, pp. 127-129).

97. Mr. Boote, another partner who supported Ms. Ezold for partnership, also expressed concerns with respect to Ms. Ezold's legal analytical ability in a number of evaluation documents that he prepared. (Def. Ex. Nos. 47, 48, 295, 296, 297, 298, 299, 300, 302, 303, 305, 306, 308). For instance, in his 1987 evaluation of Ms. Ezold, Mr. Boote wrote: "I would not want her in charge of a large, legally complex case, the traditional measure of a Wolf, Block partner." (Def. Ex. No. 308); (Boote, Day 9, pp. 145-147).

98. The Associates Committee had been apprised that Mr. Magarity, who was Ms. Ezold's most ardent supporter, had declined the opportunity to have her assigned to work full-time on his matters. (Fiebach, Day 6, pp. 126-129); (Arbittier, Day 7, pp. 129-133); (Boote, Day 9, pp. 142-143); (Strogatz, Day 11, pp. 5-6). Mr. Magarity's 1987 and 1988 "senior" associate evaluations rated Mr. Chirls higher than Ms. Ezold in the areas of legal analysis and legal writing and drafting. (Magarity, Day 4, p. 164-170). Mr. Magarity rated Mr. Chirls "distinguished" in the categories of legal analysis and legal writing because he had done "an excellent job" independently analyzing and researching a number of legal issues and drafting various pleadings and briefs without any editing by Mr. Magarity. (Magarity, Day 4, p. 168). Unlike the case with Mr. Chirls, the customary practice utilized by Mr. Magarity with Ms. Ezold and other associates was to direct the associate [286a] as to the legal issues and analysis and also to edit the associate's written product. (Magarity, Day 4, p. 168).

99. Although there was a good-faith disagreement among various Wolf, Block partners with respect to whether the Firm should relax its traditional partnership admission standards and

there was also disagreement as to whether Ms. Ezold should be admitted to the partnership, there was an overall consensus within the Firm, including Ms. Ezold's supporters, as to the level of her legal analytical ability. As noted in Mr. Fiebach's 1988 evaluation of Ms. Ezold, "I think my views on Nancy are identical to Alan Davis with whom I have discussed her although we may differ on the bottom line. . . [S]he has limitations [with] respect to complex legal issues." (Def. Ex. No. 80 at p. 003177). The consensus of the Firm's partners was that Ms. Ezold was deficient in the area of legal analysis, and even her supporters recognized that this was her weakest area.

100. After a careful and thorough review of Ms. Ezold's job performance and evaluations, extensive discussions among Associates Committee members, and discussions with various partners in the Litigation Department, the Associates Committee reached a consensus that it would not recommend Ms. Ezold for "regular" partnership, since it believed that she did not have the requisite legal analytical ability to be a general litigation partner. Nine Committee members believed that Ms. Ezold should not be recommended by the Committee for regular partnership, while one Committee [**287a**] member (Mr. Wiener, a friend and neighbor of Ms. Ezold) was in favor of recommending her for regular partnership. The Committee also decided that it would recommend Ms. Ezold for "Group VII" partnership if the Executive Committee retained that category of special partnership. (Def. Ex. No. 18); (Strogatz, Day 11, pp. 45-46); (Liebenberg, Day 10, pp. 64, 66).

101. Although Ms. Ezold had received some criticisms of her attitude and the manner in which she had raised certain administrative complaints in earlier years, the partners who expressed those criticisms did not do so because of Ms. Ezold's gender. None of the evaluations of Ms. Ezold submitted by the Firm's partners in 1988 contain any criticism of Ms. Ezold's attitude, and the criticisms of her attitude in prior years did not play any role in either the Associates Committee's 1988 decision not to recommend Ms. Ezold for partnership or Mr. Rosoff's subsequent decision to recommend to the Executive

Committee that it adopt the Associate Committee's recommendation. (Def. Ex. No. 313); (Strogatz, Day 12, p. 25); (Liebenberg, Day 10, pp. 97-98); (Rosoff, Day 12, p. 80; Day 13, pp. 12, 15, 17, 26).

102. None of the hundreds of evaluations of Ms. Ezold's job performance during her six years at Wolf, Block reflect any sexist comments, gender-based stereotypical comments, or discriminatory treatment of her on account of her gender. (Def. Ex. No. 80).

[**288a**] 103. None of the members of the Associates Committee took Ms. Ezold's gender into consideration at all in deciding whether or not to recommend her for partnership. (Strogatz, Day 11, pp. 85-86); (Liebenberg, Day 10, p. 70); (Garber, Day 12, pp. 45-46); (Day 10, pp. 106-110).

104. The Associates Committee's decision not to recommend Ms. Ezold for regular partnership was not based upon or influenced by her gender.

XI. Neither the Review by Mr. Rosoff Nor the Executive Committee's Decision Were Influenced At All by Ms. Ezold's Gender

105. In the Fall of 1988, the Chairman of the Associates Committee, Ian Strogatz, presented the Associate Committee's recommendations for partnership to the Executive Committee. Mr. Strogatz informed the Executive Committee that although Ms. Ezold had certain skills and attributes, the Committee had reached a consensus that her legal analytical ability did not meet Wolf, Block's normal partnership standards. (Kopp, Day 6, pp. 25-27); (Rosoff, Day 12, p. 80); (Strogatz, Day 11, pp. 60-61).

106. When the Associates Committee has decided not to recommend to the Executive Committee that an associate be admitted to the partnership, the Executive Committee has asked "an independent person, namely somebody not on the Associates Committee, to conduct an independent review so we

can be absolutely certain that this person should not be made a partner." (Kopp, Day 6, pp. 20-21). No such inquiry is conducted with respect to associates who have been recommended [289a] for partnership by the Associates Committee. (Kopp, Day 6, pp. 20-21); (Strogatz, Day 11, pp. 77-79).

107. After receiving the Associates Committee's partnership recommendations, the Executive Committee asked William Rosoff to perform an independent review on its behalf into Ms. Ezold's qualifications for partnership. Mr. Rosoff is the Firm's Financial Planning Partner. In 1987, Mr. Rosoff served as Chairman of the Executive Committee. (Kopp, Day 6, p. 29); (Strogatz, Day 11, pp. 77-78); (Rosoff, Day 12, pp. 82-83).

108. In addition to conducting a review concerning Ms. Ezold, Mr. Rosoff also conducted a review concerning Mr. Wiles' qualifications for partnership after the Associates Committee decided not to recommend him for admission to the partnership. (Kopp, Day 6, pp. 20-21, 30); (Strogatz, Day 11, p. 78); (Rosoff, Day 12, pp. 90-91, 104; Day 13, p. 49).

109. Mr. Rosoff reviewed evaluation documents of Ms. Ezold submitted over several years. Thereafter, he interviewed four partners in the Litigation Department who had worked directly with Ms. Ezold and who he believed would provide an "objective" assessment of Ms. Ezold's legal analytical ability. He did not interview any members of the Associates Committee, nor did he interview either Mr. Davis or Mr. Magarity, since their viewpoints were "very clear" to him from their written evaluations and he believed that the partners he chose to interview were "more objective" concerning Ms. Ezold. Mr. Rosoff believed that Mr. Davis, as a Department [290a] Chairman, had a natural "parochial interest" in sponsoring Ms. Ezold's partnership candidacy, and Mr. Magarity was "obviously actively supporting her" because she was his "principal assistant." (Rosoff, Day 12, pp. 83-85; Day 13, pp. 5-7, 12, 17, 26).

110. Mr. Rosoff interviewed Mr. Schwartz, Mr. Boote, Mr. Fiebach and Mr. Arbittier. Two of them (Messrs. Schwartz and Boote) had stated in their 1988 evaluations of Ms. Ezold that

they viewed her admission as a partner "with favor"; one (Mr. Arbittier) had stated in his 1988 evaluation that he had "mixed emotions" concerning her admission as a partner; and one (Mr. Fiebach) had indicated in his 1988 evaluation of Ms. Ezold that he viewed her admission as a partner with "negative feelings." (Def. Ex. Nos. 283, 309, 275, Def. Ex. No. 80 at p. 003177).

111. After his review of the written evaluations and his interviews, Mr. Rosoff concluded that there was an overall consensus that Ms. Ezold did not possess the level of legal analytical ability which the Firm had consistently required of its incoming partners who handled general litigation matters. (Rosoff, Day 12, pp. 85-91; Day 13, pp. 27, 30-31); (Schwartz, Day 8, p. 68); (Arbittier, Day 7, pp. 133-135).

112. Mr. Rosoff reported to the Executive Committee that, "unless we are prepared to substantially reduce the standard for making regular partner," it should adopt the Associate Committee's recommendation that Ms. Ezold **[291a]** not be admitted as a general litigation partner. (Rosoff, Day 12, p. 91); (Kopp, Day 6, p. 31). Mr. Rosoff's review of Ms. Ezold's qualifications and his recommendation to the Executive Committee with respect to her were not based upon or influenced by the fact that she is a woman.

113. Although Mr. Rosoff had not interviewed Mr. Davis as part of his review, Mr. Kopp, who was the Chairman of the Executive Committee, had spoken to Mr. Davis concerning Ms. Ezold's qualifications. Mr. Davis acknowledged to Mr. Kopp that Ms. Ezold did not have sufficient legal analytical ability to handle complex legal issues, but he expressed the view that the Firm should lower its standards to allow Ms. Ezold to become a regular partner. (Kopp, Day 6, pp. 32, 51-53). Mr. Kopp also spoke with Mr. Schwartz and Mr. Fiebach, who both expressed the view that Ms. Ezold did not have sufficient legal analytical ability to handle complex legal issues. (Kopp, Day 6, pp. 33–34) (Schwartz, Day 8, p. 69).

114. Based upon Mr. Rosoff's review and the other information it had received previously concerning Ms. Ezold, the Executive Committee decided unanimously to accept the rec-

ommendation of the Associates Committee and decided not to recommend to the partnership that Ms. Ezold be admitted as a partner. (Kopp, Day 6, pp. 77-78); (Rosoff, Day 13, p. 13).

115. None of the five members of the Executive Committee (Messrs. Kopp, Segal, Goodman, Promislo and Manko) took Ms. Ezold's gender into consideration in deciding not to [**292a**] recommend her for partnership. (Kopp, Day 6, p. 35); (Day 10, pp. 106-110). The Executive Committee's decision was not based upon or influenced by the fact that Ms. Ezold is a woman.

116. On November 30, 1988, after the completion of Mr. Rosoff's inquiry and after the Executive Committee had already decided not to recommend Ms. Ezold for admission to the partnership, Mr. Magarity sent a memorandum to the Executive Committee promoting Ms. Ezold's partnership candidacy. (Plaintiff's Exhibit No. 9a); (Rosoff, Day 12, pp. 101-102). Mr. Magarity testified on direct examination by counsel for Ms. Ezold that "This was very much a memo trying to persuade the Executive Committee, and I was writing it as an advocate for Nancy." (Magarity, Day 4, p. 159); (Plaintiff's Exhibit No. 9(a)). Mr. Magarity further testified that "I wanted to keep her. I had my own reasons for wanting to keep her." (Magarity, Day 4, p. 157). Also, in contrast to Mr. Rosoff's effort to "get behind" the mere numbers and comments on the face of the evaluations, Mr. Magarity stated that his memorandum simply tallied the number of partners who recommended Ms. Ezold for partnership, expressed "mixed feelings," or expressed "negative feelings." (Magarity, Day 4, pp. 162-163).

Trial Testimony

[1170a] Q. Before you launch into your answer, perhaps I could help you. The summary sheet, which I had shown to you first, which is 002946, lists legal analysis, legal writing and drafting, research skills, formal speech, informal speech, judgment, creativity, negotiating, advocacy skills, promptness, efficiency.

Are those standards that you look at in evaluating candidates for partners?

[MR. STROGATZ] Those are certainly all factors that would be part of our consideration."

MS. RASKIN: And then it picks up on the bottom of 382.

BY MS. RASKIN:

Q. "What are the normal standards that you look at?

A. The normal standards for partnership include as factors for consideration all of the ones that you have listed that are contained under our evaluation forms.

Q. What else?

A. That is basically it."

MS. RAKSIN: Page 387, line 23.

BY MS. RASKIN:

Q. Who were the people who had the most direct knowledge of Ezold's performance with respect to those standards, which we have already agreed, were the normal standards for partnership? * * *

[1209a] Q. And all you get is that we recommend John Jones or we don't recommend John Jones?

[MR. KOPP] I did not testify to that.

Q. Then what do you get?

A. We get the reasons why John Jones is recommended or not recommended.

Q. Whose reasons? The majority?

A. The consensus of the committee. We don't get the number of votes of who voted. We get a report that this is the consensus of the committee. That is all I know."

Line 5 on page 55:

"Q. Have you ever determined that billable hours, either the billable hours or failure to meet a standard of billable hours, should result in overruling the consensus of the associates' committee?

A. There is never, to my recollection, one single, solitary factor that turns a decision. Billable hours is [a] factor. There are other factors. We look at a lot of fac[tors].

Also, so that will understand the process, it would be helpful—this is not a case where we get to January and the associates' committee comes in and makes recommendations about people that we have never heard of before. We have heard reports about these people for years. Each year we get a report from the associates' * * *

[1253a] [MR. KOPP] Experience prior to law school is given weight only with regard to the question of whether that person should be hired at all.

In other words, there are times when experience prior to law school might indicate a background in engineering or might indicate that this person has a maturity level that is high, and that's given weight in terms of whether that person should be hired at all.

But once having made the decision to hire that person, nonlegal experience is not given credit for legal experience.

Q. So that if you are talking about hiring a law student directly out of law school, for example, one who had gone from high school to college to law school and then come right to the firm would be treated the same as someone who may have worked either before or after college or before law school?

A. Yes.

Q. What are the standards for admission for partnership, admitting associates to partnership?

A. The standards for admitting associates at Wolf, Block are that a regular partner at Wolf, Block should be able to handle by himself or herself any case that the firm gets, no matter how complex, no matter how difficult, no matter how sophisticated.

[1311a] * * *

Q. It was a growing area of the practice?

[MR. KOPP] I wouldn't say it was growing any faster than any other area. It was just an area where we had a decent amount of work.

Q. You were growing generally through the years?

A. Yes.

Q. So that the domestic relations area, like other areas, was a growing area?

A. Part of the growth.

Q. Now, you said that the executive committee recommends to the partnership, as a whole, candidates for partnership?

A. That's correct.

Q. The executive committee doesn't recommend to the partnership, as a whole, those individuals who have been rejected for partnership?

A. That's correct.

Q. So that the partnership, as a whole, never got a chance to vote in January of 1988 on Miss Ezold's candidacy; is that correct?

A. That's correct.

Q. Mr. Kopp, there has never been a woman on the executive committee, has there?

A. Not to my—

[1312a] MR. DICHTER: Objection, Your Honor, to the relevance.

THE COURT: Overruled.

THE WITNESS: Not to my recollection.

BY MS. RASKIN:

Q. Now, Mr. Kopp, do you know whether anyone on the executive committee had ever worked with Miss Ezold?

A. I'm not sure.

Q. And did you know that Mr. Segal—Mr. Segal was on the executive committee at the time that you were?

A. Yes. He was on the executive committee at the time that I was in 1988.

Q. And that was at the time of Miss Ezold's candidacy, is it not?

A. Yes.

Q. And do you know that Mr. Segal had written his 1988 evaluation form for Miss Ezold that he had no opinion of her, no contact?

A. I did not know that.

Q. Would your answer be the same for Mr. Manko?

A. Yes. I did not know if any member of the executive committee had any contact with Miss Ezold.

Q. Mr. Goodman was on the executive committee at the time that Miss Ezold's candidacy was considered; isn't that right?

Interrogatory Responses by Wolf, Block, Schorr and Solis-Cohen

[5731a]

INTERROGATORY NO. 8:

8. For all individuals listed in Defendant's Response to Plaintiff's First Set of Interrogatories, Interrogatory No. 22, state the dates of their membership on the Associates Committee.

RESPONSE TO INTERROGATORY NO. 8:

NAME	*DATES OF MEMBERSHIP ON ASSOCIATES COMMITTEE*
Ian A. L. Strogatz	1987, 1988, 1989, 1990
Bruce S. Katcher	1987, 1988, 1989
Roberta D. Liebenberg	1987, 1988, 1989, 1990
Robert I. Friedman	1987, 1988, 1989, 1990
Mark K. Kessler	1987, 1988, 1989, 1990
Ronald B. Glazer	1989, 1990
Roma Skeen Young	1989, 1990
Philip E. Garber	1987, 1988, 1989, 1990
Ronald M. Wiener	1987, 1988, 1989, 1990
Arthur R. Block	1987, 1988
M. Norman Goldberger	1987, 1988, 1989, 1990
Thomas P. Witt	1987, 1988
Robert M. McNair, Jr.	1989
Mark L. Alderman	1990

INTERROGATORY NO. 9:

9. For all individuals listed in Defendant's Response to Plaintiff's First Set of Interrogatories, Interrogatory No. 24, state the dates of their membership on the Executive Committee.

[5740a]

INTERROGATORY NO. 3:

3. State for each year from 1986 to the present the following information regarding defendant's partners and employees:

(a) that total number of partners;
(b) the number of female partners;
(c) the total number of associates;
(d) the number of female associates;
(e) the total number of litigation partners;
(f) the number of female litigation partners;
(g) the number of litigation associates;
(h) the number of female litigation associates.

RESPONSE TO INTERROGATORY NO. 3:

(a) *Total number of Partners*:

Year	*Total*
02/01/86	102
02/01/87	107
02/01/88	105
02/01/89	107
02/01/90	102

(b) *Total Number of Female Partners*:

Year	*Total*
02/01/86	5
02/01/87	4
02/01/88	5
02/01/89	5
02/01/90	5

(c) *Total Number of Associates*:

Year	*Total*
02/01/86	91
02/01/87	102
02/01/88	111
02/01/89	117
02/01/90	113

Plaintiff's Exhibit No. 200d

6240a Review Period:
5-1-87 – 5-30-88

COMMITTEE MEMBER'S ASSOCIATE EVALUATION SUMMARY

Name Nancy O. Ezold

Senior [x]
Non-Senior [ ]

Department Litigation

Law School Class '81
(actually '80 viewed as '81)

Earliest Partnership Consideration 2-1-89

Current Salar $70,000 as of 9/28/87

Billable Hours Prior Year 1,928.30

Non-Billable Hours Prior Year 373.30

Billable Hours Current Year thru 6/88: 931.70

Non-Billable Hours Current Year thru 6/88: 141.20

Lawyers Who Requested To Be Interviewed R. BOOTE, A. DAVIS, S. GOODMAN, G. MAGARITY, B. SCHWARTZ

Completing Partner A. BLOCK

I. LEGAL

	D	G	A	M	U
1. Analysis		x			
2. Writing		x			
3. Research		x			
4. Formal Speech		x			
5. Informal Speech		x			
6. Judgment		x			
7. Creativity		x			
8. Nego./Advo.		x			
9. Promptness		x			
10. Efficiency		x			
Bottom Line		x			

COMMENTS:

COMMENTS:

Grades all over—range from "D" to "M.". Common view is that Nancy has many fine and valued abilities—industry, negotiating skills, trial skills and good judgment and common sense; but she is no "legal scholar" and never will be. The evaluations reflect the degree to which the reviewer considers serious intellectual ability as a prerequisite to regular partnership and/or the degree to which Nancy does his work. Ignoring Magarity's view for the latter reason, Davis starts out cold and votes Yes with enthusiasm; Fiebach votes a strong no. Overall stronger grades in intellectual skills than last time.

II. PERSONAL

	D	G	A	M	U
11. Reliability		x			
12. Responsibility		x			
13. Flexibility		x			
14. Growth		x			
15. Attitude		x			
16. Client Relations		x			
17. Client Serv./Devel.		x			
18. Pressure		x			
19. Independence		x			
20. Dedication		x			
Bottom Line		x			

COMMENTS:
More consistent good grades in II categories. Universally recognized as mature, confident and dedicated.

COMMENTS:

Plaintiff's Exhibit No. 200a

6197a

Review Period:
5-1-86 – 4-30-87

COMMITTEE MEMBER'S ASSOCIATE EVALUATION SUMMARY

Name Bruce Grohsgal

Senior [X]
Non-Senior [ ]

Department Real Estate

Law School Class '80

Earliest Partnership Consideration 2-1-88

Current Salary $59,000

Billable Hours Prior Year 1733

Non-Billable Hours Prior Year 304

Billable Hours Current Year AS OF 5-19-87: 524

Non-Billable Hours Current Year AS OF 5-19-87: 51

Lawyers Who Requested To Be Interviewed J. GOLDBERG: "IF THERE IS ANY DOUBT ABOUT BRUCE, I WOULD LIKE THE OPPORTUNITY TO SUPPORT HIM ORALLY. M. DEAN, J. MANKO, H. MILLER, J. ROSENSTEIN, LIZ READ??

Completing Partner P.E. GARBER

I. LEGAL

	D	G	A	M	U	
1. Analysis		x				
2. Writing		x				
3. Research		x				–A
4. Formal Speech			A+			
5. Informal Speech			A+			
6. Judgment		G–				
7. Creativity		G–				
8. Nego./Advo.		x				
9. Promptness			x			
10. Efficiency			x			
Bottom Line		G–				G–

COMMENTS:
[ILLEGIBLE HANDWRITING]

COMMENTS:

Analysis and Writing are clearly "good."
(Miller and Dean gave adequate mix) _____
Research—less clear because of nature of practice
Speech—Mixed reviews between G and A
Judgment and Creativity— ____ mixed, better than speech.
Promptness and ____ adequate only, perhaps because of workload.

Bottom Line: Difficult to make a judgment. Fiebach and Bean rate him distinguished. Most rate him good. But Segal and Dean rate him adequare, with Miller rating him adequate minus. Overall, I believe he is a G—.

II. PERSONAL

	D	G	A	M	U
11. Reliability			x		
12. Responsibility		x			
13. Flexibility		x			
14. Growth		x			
15. Attitude		x			
16. Client Relations		x			
17. Client Serv./Devel.		x			
18. Pressure			x		
19. Independence		x			
20. Dedication		x			
Bottom Line		G			

COMMENTS:

COMMENTS:

Recognition among partners that his attitude is good. Pattern of only adequate with respect to reliability, working under pressure and getting work done. Unusual personality.

Plaintiff's Exhibit No. 200b

6212a

Review Period:
5-1-86 – 4-30-87

COMMITTEE MEMBER'S ASSOCIATE EVALUATION SUMMARY

Name Jeremy T. Rosenblum

Senior [x]
Non-Senior [ ]

Department Corporate

Law School Class '79

Earliest Partnership Consideration 2-1-88

Current Salary $75,000 (AS OF 2-1-87— NO INCREASE IN JULY, 1987)

Billable Hours Prior Year 2123

Non-Billable Hours Prior Year 256

Billable Hours Current Year AS OF 5-19-87: 492

Non-Billable Hours Current Year AS OF 5-19-87: 66

Lawyers Who Requested To Be Interviewed A. REUBEN, M. SHERMAN, J. REDEKER

Completing Partner R.M. WIENER

I. LEGAL

	D	G	A	M	U
1. Analysis		✔			
2. Writing		✔			
3. Research			✔		
4. Formal Speech			✔		
5. Informal Speech			✔		
6. Judgment		✔			
7. Creativity		✔			
8. Nego./Advo.		✔			
9. Promptness			✔		
10. Efficiency		✔			
Bottom Line		✔			

COMMENTS:
Limited reviews of research, but seems at least "adequate" if not "good." Formal and informal speech are weakest areas in legal skills. Promptness is his other weak area.

COMMENTS:

II. PERSONAL

	D	G	A	M	U
11. Reliability			✔		
12. Responsibility		✔			
13. Flexibility		✔			
14. Growth		✔			
15. Attitude		✔			
16. Client Relations		✔			
17. Client Serv./Devel.		✔			
18. Pressure			✔		
19. Independence		✔			
20. Dedication		✔			
Bottom Line		✔			

COMMENTS:
Works very hard—"Dedication" and "Responsibility" border on "Distinguished". Some weaknesses based in part on lack of organization and excessive workload.

COMMENTS:

Plaintiff's Exhibit No. 200c

6227a Review Period:
5-1-87 – 5-30-88

COMMITTEE MEMBER'S ASSOCIATE EVALUATION SUMMARY

Name Andrew A. Chirls

Senior [x]
Non-Senior [ ]

Department Litigation

Law School Class '81

Earliest Partnership Consideration 2-1-89

Current Salary $70,000 (as of 9/28/87)

Billable Hours Prior Year 1,892.90

Non-Billable Hours Prior Year 244.80

Billable Hours Current Year THRU 6/88 – 746.00

Non-Billable Hours Current Year THRU 6/88 – 85.80

Lawyers Who Requested To Be Interviewed M. ALDERMAN, D. JOSEPH, M. KRASNY ("If necessary.")

Completing Partner A. BLOCK

I. LEGAL

	D	G	A	M	U
1. Analysis		x			
2. Writing		x			
3. Research		x			
4. Formal Speech		x			
5. Informal Speech		x			
6. Judgment		x			
7. Creativity		x			
8. Nego./Advo.		x			
9. Promptness		x			
10. Efficiency		x			
Bottom Line		x			

COMMENTS:

COMMENTS:
Varied grades, some "D"'s, some "A"'s. Arbittier says "not real smart". Davis votes no and is harsh with view but appears more for personality! and ____ than substance. Most others generally positive. (He had a personal problem with Kauffman).

II. PERSONAL

	D	G	A	M	U
11. Reliability		x			
12. Responsibility		x			
13. Flexibility		x			
14. Growth		x			
15. Attitude		x			
16. Client Relations		x			
17. Client Serv./Devel.		x			
18. Pressure		x			
19. Independence		x			
20. Dedication		x			
Bottom Line		x			

COMMENTS:

COMMENTS:

Plaintiff's Exhibit No. 200e

6253a

Review Period:
5-1-87 – 5-30-88

COMMITTEE MEMBER'S ASSOCIATE EVALUATION SUMMARY

Name David Gitlin

Senior [x]
Non-Senior [ ]

Department Corporate

Law School Class '81 is '79 but viewed as '81

Earliest Partnership Consideration 2/1/89

Current Salary $70,000 (as of 9/28/87)

Billable Hours Prior Year 1,848.60

Non-Billable Hours Prior Year 231.60

Billable Hours Current Year THRU 6/88 – 803.50

Non-Billable Hours Current Year THRU 6/88 – 72.50

Lawyers Who Requested To Be Interviewed S. GOODMAN ("Only if a problem."), D. PROMISLO ("I assume David is going to become a regular partner. If that assumption is not so, I would welcome the opportunity to talk to someone from the Associates Committee.")

Completing Partner R. LIEBENBERG

I. LEGAL

	D	G	A	M	U
1. Analysis					
2. Writing					
3. Research					
4. Formal Speech					
5. Informal Speech					
6. Judgment					
7. Creativity					
8. Nego./Advo.					
9. Promptness					
10. Efficiency					
Bottom Line		G			

COMMENTS:

COMMENTS:
Steve Goodman is very enthusiastic about David. He is already assigning partner level work to him and is very satisfied with David's performance. David appears to be very well suited for merger and acquisition work. However, other attorneys find David's work just acceptable.

II. PERSONAL

	D	G	A	M	U
11. Reliability					
12. Responsibility					
13. Flexibility					
14. Growth					
15. Attitude					
16. Client Relations					
17. Client Serv./Devel.					
18. Pressure					
19. Independence					
20. Dedication					
Bottom Line		G			

COMMENTS:

COMMENTS:

Plaintiff's Exhibit No. ___

6295a Review Period: 5-30-88

COMMITTEE MEMBER'S ASSOCIATE EVALUATION SUMMARY

Name David I. Bookspan

Senior [x]
Non-Senior [ ]

Department Litigation

Law School Class '82

Earliest Partnership Consideration 2/1/90

Current Salary $67,000 (as of 9/28/87)

Billable Hours Prior Year 2,614.30

Non-Billable Hours Prior Year 248.30

Billable Hours Current Year THRU 6/88 – 776.00

Non-Billable Hours Current Year THRU 6/88 – 127.00

Lawyers Who Requested To Be Interviewed D. JOSEPH ("Only if there are any questions about his direct route to partner."). K. WARREN ("Norman is aware of my views."), D. Simon ("Up to you.")

Completing Partner A. BLOCK

I. LEGAL

	D	G	A	M	U
1. Analysis		x			
2. Writing		x			
3. Research		x			
4. Formal Speech		x			
5. Informal Speech		x			
6. Judgment		x			
7. Creativity		x			
8. Nego./Advo.		x			
9. Promptness		x			
10. Efficiency		x			
Bottom Line		x			

COMMENTS:

COMMENTS:

Many more litigation reviews show a different picture than last time, when Poul loved him and Simon hated him. Simon's views on the same issues, a uniform view of David as having "G" law skills without the desire to work hard. He appears to act as if he is a "D" lawyer without backing it up with work, comments like "too slick" and "more sizzle than steak." Two comments about overbilling matters, also a bad sign. Is only 25 and 2M out of 14 reviews ____ indications of avoiding hard work?

II. PERSONAL

	D	G	A	M	U
11. Reliability			x		
12. Responsibility			x		
13. Flexibility			x		
14. Growth			x		
15. Attitude			x		
16. Client Relations			x		
17. Client Serv./Devel.			x		
18. Pressure			x		
19. Independence			x		
20. Dedication			x		
Bottom Line			x		

COMMENTS:

COMMENTS:

See above

Plaintiff's Exhibit No. 200k

6309a Review Period:
6-1-88 – ?-??-8?

COMMITTEE MEMBER'S ASSOCIATE EVALUATION SUMMARY

Name Leonard P. Goldberger

Senior [x]
Non-Senior [ ]

Department Corporate

Law School Class '76

Earliest Partnership Consideration 2-1-90

Current Salary $81,000

Billable Hours Prior Year 2044.90

Non-Billable Hours Prior Year 424.60

Billable Hours Current Year 2/89 – 5/89 871.30

Non-Billable Hours Current Year 2/89 – 5/89 115.50

Lawyers Who Requested To Be Interviewed B. SCHWARTZ

Completing Partner R.D. LIEBENBERG

I. LEGAL SKILLS

	D	G	A	M	U
1. Legal Analysis		✔			
2. Writing & Drafting		G			
3. Oral Communication		✔			
4. Research Skills			✔		
5. Prompt. & Effic.		✔			

COMMENTS:

Len seems to know the bankruptcy field. There are not many comments on Len's substantive capabilities but his strengths seem to be his ability to attract business and sell the Firm.

COMMENTS:

II. PERSONAL

	D	G	A	M	U
1. Dedication			✔		
2. Reliability			✔		
3. Manag. Respon.		G-			
4. Attitude			✔		

COMMENTS:

Len seems to have somewhat of an attitude problem. There are some criticisms that he does not get his work done timely.

COMMENTS:

"I would object if the Associates Committee deemed it appropriate to disclose my comments and identity to this associate in giving him/her an evaluation."

I. Light, B. Schwartz, H.R. Fiebach, B. Katcher, A. Kaplinsky, G. Brantz

Plaintiff's Exhibit No. 200n

6347a

Review Period:
6-1-88 – ?-??-8?

COMMITTEE MEMBER'S ASSOCIATE EVALUATION SUMMARY

Name Neil S. Witkes

Senior [x]
Non-Senior [ ]

Department Litigation

Law School Class '82

Earliest Partnership Consideration 2-1-90

Current Salary $76,000

Billable Hours Prior Year 1964.00

Non-Billable Hours Prior Year 197.10

Billable Hours Current Year 720.70

Non-Billable Hours Current Year 55.60

Lawyers Who Requested To Be Interviewed B. SCHWARTZ, R. BOOTE

Completing Partner M.K. KESSLER

I. LEGAL SKILLS

	D	G	A	M	U
1. Legal Analysis		✔			
2. Writing & Drafting		✔			
3. Oral Communication		✔			
4. Research Skills		✔			
5. Prompt. & Effic.		✔			

COMMENTS:

COMMENTS:

Grades are remarkably consistent from all who graded him.

II. PERSONAL

	D	G	A	M	U
1. Dedication	✔				
2. Reliability	✔				
3. Manag. Respons.	✔				
4. Attitude	✔				

COMMENTS:

COMMENTS:

"I would object if the Associates deemed it appropriate to disclose my comments and identity to this associate in giving him/her an evaluation."

A. Reuben, B. Schwartz, G. Brantz, I. Light

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 91-1741, 91-1780

NANCY O'MARA EZOLD,
Appellee and Cross-Appellant,

v.

WOLF, BLOCK, SCHORR AND SOLIS-COHEN,
Appellant and Cross-Appellee.

BRIEF OF APPELLANT AND CROSS-APPELLEE WOLF, BLOCK, SCHORR AND SOLIS-COHEN

APPEAL FROM FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Mark S. Dichter
MORGAN, LEWIS & BOCKIUS
2000 One Logan Square
Philadelphia, PA 19103
(215) 963-5291

Arlin M. Adams
SCHNADER, HARRISON, SEGAL & LEWIS
1600 Market Street
Philadelphia, PA 19103
(215) 751-2072

Attorneys for Wolf, Block, Schorr and Solis-Cohen

ner as to support conclusions of pretext and gender-based disparate treatment. However, Judge Kelly's purported "comparative analysis" is legally invalid because it improperly:

- Focuses upon Ezold's favorable evaluations in criteria other than legal analysis, as well as isolated criticisms of the eight successful male partnership candidates in criteria other than legal analysis;
- Ignores the many criticisms of Ezold's analytical ability;
- Ignores the many favorable evaluations of the analytical ability of the eight male candidates;
- Ignores the evaluations of other male associates who, like Ezold, were passed over for regular partnership because of an assessment that they too were deficient in analytical ability; and
- Fails to consider the evaluations of successful female partnership candidates, which contain isolated criticisms of them in criteria other than legal analysis similar to those of the eight male candidates.

1. Judge Kelly Committed Legal Error By Basing His "Comparative Analysis" Upon Evaluation Criteria Other Than Legal Analysis

Judge Kelly's "comparative analysis" consists merely of a juxtaposition of selective evaluation comments favorable to Ezold in criteria *other* than legal analysis with isolated snippets of criticism of eight successful male partnership candidates in criteria *other* than legal analysis. Since Ezold's partnership candidacy was rejected *solely* because her analytical ability was assessed to be deficient, Judge Kelly's rose-colored depiction of her other attributes (*e.g.*, personality, attitude, client skills) and his unflattering depiction of the male candidates in those same inapposite criteria are entirely beside the point. That Judge Kelly focused on the wrong evaluation criteria is undoubtedly attributable to the fact that his Findings concerning the evaluations of Ezold and the male candidates were

copied *verbatim* from the self-serving and misleading Proposed Findings submitted by her counsel.[29]

Conspicuously, Judge Kelly's Findings (and Ezold's evaluation file) reflect a dearth of comments praising her analytical ability. Instead, the evaluation comments relied upon by Judge Kelly state: "I state . . . her research, her meeting with all opposing counsel and her handling of her clients." (No. 61); "an exceptionally good courtroom lawyer, instills confidence in clients, gets things done, is unafraid. . . ." (No. 62); "presents herself to the court and clients as an effective representative of the firm." (No. 63); "Has shown industriousness, dedication, good judgment and client skills in several matters." (No. 66); "never complains about workload and is always available." (No. 68); "has excellent skills in various areas of litigation, including case management, document management, witness preparation, dealing with opponents, professionalism, maturity, aggressiveness. . . ."[30] (No. 69) (93-97a).

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29. Judge Kelly made 50 Findings relating to Ezold's job performance and evaluations. (Nos. 22-71) (83-97a). *All but two* of those 50 Findings were copied verbatim from the Proposed Findings drafted by Ezold's attorneys. (*Cf.* 339-57a). Moreover, *all* 43 of the Findings by Judge Kelly relating to the eight male candidates to whom he compared Ezold (Nos. 76-118) were copied verbatim from her Proposed Findings, as were 11 of the 12 Conclusion of Law relating to her disparate treatment claim. (*Cf.* 98-107a and 115-18a and 419-22a).

Although Judge Kelly's "cut-and-paste" approach to preparing his Findings may not, in itself, require reversal, *Hayes v. Community Gen. Osteopathic Hospital*, 940 F.2d 54, 57 (3d Cir. 1991), nonetheless this practice is certainly not one which reflects either a careful or independent review of the record by the fact finder. At trial (1535a), Judge Kelly expressed his reluctance to read the record. Copying of proposed findings may be permissible when considering simple fact issues, such as the evidence on Ezold's constructive discharge claim. However, Judge Kelly's uncritical acceptance of Ezold's Proposed Findings on her disparate treatment claim is particularly troublesome and fraught with peril, since there were thousands of evaluation documents to sift through and compare and the voluminous record was susceptible to distortion and mischaracterization.

30. It was because of these attributes that the Associates Committee recommended Ezold's admission as a Group VII "special" partner and Kopp later extended the domestic relations partnership offer to her. *See* pp. 13, 17, *supra*.

Similarly, Judge Kelly recites at length the isolated fragments of criticism of eight male candidates in criteria other than legal analysis called by Ezold's attorneys from the thousands of grades

SUPREME COURT OF THE UNITED STATES

No. A-744

NANCY O'MARA EZOLD,

Petitioner

—v.—

WOLF, BLOCK, SCHORR AND SOLIS-COHEN

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including June 18, 1993.

/s/ D. H. SOUTER

Associate Justice of the Supreme Court of the United States

Dated this 2nd
day of April, 1993.